



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L Eng A 75 d 427.

L.C. **OW.U.K.**

100

m95.





REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
Courts of Exchequer & Exchequer Chamber,
FROM
EASTER TERM, 8 VICT.
TO
MICHAELMAS VACATION, 9 VICT., BOTH INCLUSIVE;
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

—◆—
BY
R. MEESON, Esq., AND W. N. WELSBY, Esq.,
OF THE MIDDLE TEMPLE, BARRISTERS-AT-LAW.

—◆—
VOL. XIV.

LONDON:
S. SWEET, CHANCERY LANE; A. MAXWELL & SON,
V. & R. STEVENS & G. S. NORTON, BELL YARD, LINCOLN'S INN;
Law Booksellers & Publishers:
HODGES & SMITH, GRAFTON STREET, DUBLIN.

1846.

•

JUDGES

OF THE

COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.
Sir ROBERT MONSEY ROLFE, Knt.
Sir THOMAS JOSHUA PLATT, Knt.

ATTORNEYS-GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.
Sir FREDERICK THESIGER, Knt.

SOLICITORS-GENERAL.

Sir FREDERICK THESIGER, Knt.
Sir FITZ-ROY KELLY, Knt.

A T A B L E

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

ADCOCK, Perkins v. -	808	Bodell, Watson v. -	57
Allen, Bridgewater, (Mayor &c., of) v. -	393	Botfield, Bradburne v. -	559
Alsager v. The St. Katherine's Dock. Co. -	794	Bradburne v. Botfield -	559
Appelmans v. Blanche -	154	Bradley v. Bardsley -	873
Ashton v. Brevitt -	106	Brevitt, Ashton v. -	106
Aston, Pennell v. -	415	Bridgewater (Mayor &c., of) v. Allen -	393
Atkinson v. Smith -	695	Brittain v. Lloyd -	762
Attorney-General v. Brown -	300	Brook, Crellin v. -	11
— v. Hertford		Brooke, Sutcliffe v. -	855
(Marquis of) -	284	Brown, Attorney-General v. -	300
		Brydges, Harvey v. -	437
Bailey v. Porter -	44	Buckley, <i>Ex parte</i> , <i>In re</i> Clarke -	469
Baker, Hagger v. -	9		
— v. Walker -	465	Calder and Hebble Navigation Company v. Pilling -	76
Barber, <i>In re</i> -	720	Calvert, Crellin v. -	11
Bardsley, Bradley v. -	873	Chanter v. Johnson -	408
Barnard, Lockhart v. -	674	Chapman, Jones v. -	124
Barrett v. Rolph -	348	Chappell, Piper v. -	624
Bartlett v. Benson -	733	— v. Purday -	303
— v. Dimond -	49	Cholmeley v. Darley -	345
Bearup v. Peacock -	149	Clark, Lawrence v. -	250
Benbow v. Jones -	193	Clarke, <i>In re</i> , <i>Ex parte</i> Buckley -	469
Benson, Bartlett v. -	738	— Rawlinson v. -	187
Birt v. Leigh -	177	Cobbett, <i>In re</i> -	175
Bishop v. Goodwin -	260	Cock v. Gent -	680
Bittleston v. Cooper -	399	Cook v. Swift -	235
Blanche, Appelmans v. -	154	Cooper, Bittleston v. -	399
Blore, Hoyles v. -	387	Cotterell, Goslin v. -	71

Cowdell, Webb <i>v.</i>	-	-	820	Gent, Cock <i>v.</i>	-	-	680
Crellin <i>v.</i> Brook	-	-	11	Gibbs <i>v.</i> Ralph	-	-	804
— <i>v.</i> Calvert	-	-	11	Gilbert <i>v.</i> Schwenck	-	-	488
Cross, Nicholls <i>v.</i>	-	-	42	Giubilei, Dietrichsen <i>v.</i>	-	-	845
Crouch, Kynaston <i>v.</i>	-	-	266	Goff, Mills <i>v.</i>	-	-	72
Curtis <i>v.</i> Scales	-	-	444	—, Smith <i>v.</i>	-	-	264
				Goodliff <i>v.</i> Fuller	-	-	4
Darley, Cholmeley <i>v.</i>	-	-	345	Goodwin, Bishop <i>v.</i>	-	-	260
— Surman <i>v.</i>	-	-	181	Goslin <i>v.</i> Cotterell	-	-	71
Davey <i>v.</i> Warne	-	-	199	Grantham Canal Navigation			
Davies <i>v.</i> Thomson	-	-	161	Company <i>v.</i> Hall	-	-	880
Dickinson <i>v.</i> Marrow	-	-	713	Great Western Railway			
Dietrichsen <i>v.</i> Giubilei	-	-	845	Company, Rigby <i>v.</i>	-	-	811
Dimmock <i>v.</i> Sturla	-	-	758	Griffiths, <i>In re</i>	-	-	510
Dimond, Bartlett <i>v.</i>	-	-	49	Gyde <i>v.</i> Roe, Doe <i>d.</i>	-	-	788
Doe <i>d.</i> Sams <i>v.</i> Garlick	-	-	698				
— <i>d.</i> Lloyd <i>v.</i> Ingleby	-	-	91	Hagger <i>v.</i> Baker	-	-	9
— <i>d.</i> Hutchinson <i>v.</i> Manchester, Bury, and Rossendale Railway Company	-	-	687	Hale <i>v.</i> Oldroyd	-	-	789
— <i>d.</i> Gyde <i>v.</i> Roe	-	-	788	Hall, The Grantham Canal Navigation Company <i>v.</i>	-	-	880
— <i>d.</i> Jukes <i>v.</i> Sumner	-	-	39	Hancock, Hodgins <i>v.</i>	-	-	120
— <i>d.</i> Hull <i>v.</i> Wood	-	-	682	Harmer <i>v.</i> Johnson	-	-	336
Dominy, Thompson <i>v.</i>	-	-	403	—, Steele <i>v.</i>	-	-	136, 831
Dresser <i>v.</i> Stansfield	-	-	822	Harper, Eccles <i>v.</i>	-	-	248
Dublin and Drogheda Railway Company, Evans <i>v.</i>	-	-	142	Harris, Ireland <i>v.</i>	-	-	432
Dubourg, Lumley <i>v.</i>	-	-	295	Harrison <i>v.</i> Luke	-	-	139
Dunbar, Stamford (Earl of) <i>v.</i>	-	-	151	Hart <i>v.</i> Prendergast	-	-	741
				Harvey <i>v.</i> Brydges	-	-	437
Earlth, Palmer <i>v.</i>	-	-	428	Hatfield <i>v.</i> Phillips	-	-	665
Eccles <i>v.</i> Harper	-	-	248	Hay, Redman <i>v.</i>	-	-	476
Emery <i>v.</i> Richards	-	-	728	Heane, Yearsley <i>v.</i>	-	-	322
Evans <i>v.</i> Dublin & Drogheda Railway Company	-	-	142	Heather, Hinton <i>v.</i>	-	-	131
—, Jeffreys <i>v.</i>	-	-	210	Hellings, Mearing <i>v.</i>	-	-	711
Ewart <i>v.</i> Jones	-	-	774	Hertford (Marquis of), Attorney-General <i>v.</i>	-	-	284
				Hinton <i>v.</i> Heather	-	-	131
Fether, Yorston <i>v.</i>	-	-	851	Hodgins <i>v.</i> Hancock	-	-	120
Fleetwood, Walford <i>v.</i>	-	-	449	Hogarth <i>v.</i> Penny	-	-	494
Fuller, Goodliff <i>v.</i>	-	-	4	Hoult, Winwood <i>v.</i>	-	-	197
Fytche, Jacklin <i>v.</i>	-	-	381	Hoyles <i>v.</i> Blore	-	-	387
				Hudson, Thomas <i>v.</i>	-	-	353
Garlick, Doe <i>d.</i> Sams <i>v.</i>	-	-	698	Hull <i>v.</i> Wood, Doe <i>d.</i>	-	-	682
Gaskell <i>v.</i> Sefton	-	-	802	Humphreys <i>v.</i> Jones	-	-	2
Geach <i>v.</i> Ingall	-	-	95	Hutchinson <i>v.</i> Manchester, Bury, and Rossendale Railway Company, Doe <i>d.</i>	-	-	687

Huth, Ormrod <i>v.</i> -	- 651	Midland Counties Railway Company, Macintosh <i>v.</i> -	548
Ingall, Geach <i>v.</i> -	95	Midgley <i>v.</i> Richardson -	595
Ingleby, Doe <i>d.</i> Lloyd <i>v.</i> -	91	Mills <i>v.</i> Goff -	72
Ireland <i>v.</i> Harris -	432	Moon <i>v.</i> Robinson -	427
Jacklin <i>v.</i> Fytche -	381	Musgrove, Playfair <i>v.</i> -	239
Jeffreys <i>v.</i> Evans -	210	Newton, Williams <i>v.</i> -	747
Johnson, Chanter <i>v.</i> -	408	Nicholls <i>v.</i> Cross -	42
———, Harmer <i>v.</i> -	336	———, Mason <i>v.</i> -	118
Johnston, Wiggins <i>v.</i> -	609	Norman <i>v.</i> Phillips -	277
Jones, Benbow <i>v.</i> -	193	Oldroyd, Hale <i>v.</i> -	789
——— <i>v.</i> Chapman -	124	Order of the Judges -	335
———, Ewart <i>v.</i> -	774	Ormrod <i>v.</i> Huth -	651
———, Humphreys <i>v.</i> -	2	Palmer <i>v.</i> Earith -	428
Jukes <i>v.</i> Sumner, Doe <i>d.</i> -	89	Peacock, Bearup <i>v.</i> -	149
Kynaston <i>v.</i> Crouch -	266	Pennell <i>v.</i> Aston -	415
Lamb, Turner <i>v.</i> -	412	Penny, Hogarth <i>v.</i> -	494
Langston <i>v.</i> Wetherell -	104	Perkins <i>v.</i> Adcock -	808
Lawrence <i>v.</i> Clark -	250	Phillipps <i>v.</i> Smith -	589
Leaf <i>v.</i> Topham -	146	Phillips, Hatfield <i>v.</i> -	665
Ledsam, Russell <i>v.</i> -	574	———, Norman <i>v.</i> -	277
Leigh, Birt <i>v.</i> -	177	——— <i>v.</i> Warren -	879, 730
Lloyd, Brittain <i>v.</i> -	762	Pilling, Calder and Hebble Navigation Company <i>v.</i> -	76
——— <i>v.</i> Ingleby, Doe <i>d.</i> -	91	Piper <i>v.</i> Chappell -	624
Lockhart <i>v.</i> Barnard -	674	Playfair <i>v.</i> Musgrove -	239
Luke, Harrison <i>v.</i> -	139	Plowden, Thorpe <i>v.</i> -	520
Lumley <i>v.</i> Dubourg -	295	Porter, Bailey <i>v.</i> -	44
Macaulay, Wrightson <i>v.</i> -	214	Powell, Russell <i>v.</i> -	418
Macey, Richards <i>v.</i> -	484	Prendergast, Hart <i>v.</i> -	741
Macintosh <i>v.</i> Midland Counties Railway Company -	548	Purday, Chappell <i>v.</i> -	303
M'Intyre <i>v.</i> Somers -	102	Ralph, Gibbs <i>v.</i> -	804
Manchester, Bury, and Rossendale Railway Company, Doe <i>d.</i> Hutchinson <i>v.</i> -	687	Rawlinson <i>v.</i> Clarke -	187
Marfleet, Rylatt <i>v.</i> -	233	Redman <i>v.</i> Wilson -	476
Marrow, Dickinson <i>v.</i> -	713	——— <i>v.</i> Hay -	476
Mason <i>v.</i> Nicholls -	118	Richards, Emery <i>v.</i> -	728
———, Turner <i>v.</i> -	42	——— <i>v.</i> Macey -	484
Mawhood, Smith <i>v.</i> -	452	Richardson, Midgley <i>v.</i> -	595
Mearing <i>v.</i> Hellings -	711	Rigby <i>v.</i> The Great Western Railway Company -	811
Memoranda -	678, 884	Robinson, Moon <i>v.</i> -	427
		Roe, Doe <i>d.</i> Gyde <i>v.</i> -	788
		Rolph, Barrett <i>v.</i> -	848

Rosse (Earl of) <i>v.</i> Wainman-	859	Tanner <i>v.</i> Scovell	- - 24
Rowlands <i>v.</i> Springett	- 7	Thomas <i>v.</i> Hudson	- - 35
Russell <i>v.</i> Ledsam	- - 574	Thompson <i>v.</i> Dominy	- - 40
——— <i>v.</i> Powell	- - 418	Thomson, Davies <i>v.</i>	- - 16
Rylatt <i>v.</i> Marfleet	- - 233	Thorpe <i>v.</i> Plowden	- - 52
		Topham, Leaf <i>v.</i>	- - 14
		Turner <i>v.</i> Lamb	- - 41
		——— <i>v.</i> Mason	- - 4
St. Katherine's Dock Com-			
pany, Alsager <i>v.</i>	- 794	Udal <i>v.</i> Walton	- - 25
Sams <i>v.</i> Garlick, Doe <i>d.</i>	- 698		
Savage, Stokes <i>v.</i>	- 152, n.	Wainman, Rosse (Earl of) <i>v.</i>	859
Scales, Curtis <i>v.</i>	- - 444	Walford <i>v.</i> Fleetwood	- - 44
Schwenck, Gilbert <i>v.</i>	- - 488	Walker, Baker <i>v.</i>	- - 46
Scovell, Tanner <i>v.</i>	- - 28	Walton, Udal <i>v.</i>	- - 25
Sefton, Gaskell <i>v.</i>	- - 802	Warne, Davey <i>v.</i>	- - 19
Sidney, Slaney <i>v.</i>	- - 800	Warren, Phillips <i>v.</i>	- 379, 73
Slaney <i>v.</i> Sidney	- - 800	Waters, Williams <i>v.</i>	- - 16
Smith, Atkinson <i>v.</i>	- - 695	Watson <i>v.</i> Bodell	- - 5
——— <i>v.</i> Goff	- - 264	Webb <i>v.</i> Cowdell	- - 82
——— <i>v.</i> Mawhood	- - 452	West <i>v.</i> Steward	- - 4
———, Phillipps <i>v.</i>	- - 589	Wetherell, Langston <i>v.</i>	- - 10
Somers, M'Intyre <i>v.</i>	- - 102	Whalley, <i>In re</i>	- - 73
Springett, Rowlands <i>v.</i>	- 7	Wiggins <i>v.</i> Johnston	- - 60
Stamford (Earl of) <i>v.</i> Dunbar	151	Williams <i>v.</i> Newton	- - 74
Stansfield, Dresser <i>v.</i>	- - 822	——— <i>v.</i> Waters	- - 16
Steele <i>v.</i> Harmer	- 136, 831	Wilson, Redman <i>v.</i>	- - 47
Steward, West <i>v.</i>	- - 47	Winwood <i>v.</i> Hoult	- - 19
Stokes <i>v.</i> Savage	- - 152, n.	Wrightson <i>v.</i> Macaulay	- - 21
Stretton, <i>In re</i>	- - 806	Wood, Doe <i>d.</i> Hull <i>v.</i>	- - 68
Sturla, Dimmock <i>v.</i>	- - 758		
Sumner, Doe <i>d.</i> Jukes <i>v.</i>	- - 39	Yearsley <i>v.</i> Heane	- - 32
Surman <i>v.</i> Darley	- - 181	Yorston <i>v.</i> Fether	- - 85
Sutcliffe <i>v.</i> Brooke	- - 855		
Swift, Cook <i>v.</i>	- - 235		

ERRATA.

Page 14, line 4, insert "not" before "recover."

„ 403, marginal note, line 7 from bottom, *dele* "it."

„ 520, marginal note, line 21, for "charged" read "discharged."

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

EASTER TERM, 8 VICTORIÆ.

HUMPHREYS, Administrator of EDWARD HUMPHREYS,
deceased, v. JONES.

1845.

April 17.

ASSUMPSIT on a joint and several promissory note for £400 and interest, made by the defendant and one Robert Jones, since deceased, dated 6th June, 1833, payable to the plaintiff's intestate.—Plea (inter alia) the Statute of Limitations. At the trial before *Wightman*, J., at the last Assizes at Liverpool, it appeared that the defendant signed the note as surety for his brother, Robert Jones, who had paid the interest up to the time of his death in 1835, and whose widow had also afterwards paid interest

A. having signed, as surety for B., a joint and several promissory note made by A. and B., and being called upon after B.'s death for payment of the money due upon it, requested the holder to apply to B.'s execu-

trix, stating (in writing), that "what she should be short he would assist to make up." The executrix having been applied to, but not paying anything:—*Held*, that A.'s conditional promise of payment became thereby absolute, and rendered him liable in an action brought against him on the note more than six years after its date, and after a reasonable time for payment by the executrix had elapsed.

1845.
 HUMPHREYS
 v.
 JONES.

on the note till 1839. The evidence to take the case out of the Statute of Limitations, as against the defendant, consisted of certain letters written by him in the years 1840 and 1841, in answer to applications from the plaintiff's attorney. On the 5th of December, 1840, the attorney applied to the defendant for payment of the note; and on the 8th the defendant wrote in answer, stating, that he had written to the executrix to come and arrange about it, and he would write again after he had seen her. On the 6th March, 1841, the plaintiff's attorney again wrote to the defendant as follows:—"I beg to call your attention to my letter of the 5th December last, respecting the £400 due on your note to Mr. Edward Humphreys. The money is wanted immediately, and I will therefore thank you to fix an early day for the payment thereof, in order that I may arrange with the parties." To this letter, on the 8th March, the defendant replied as follows:—"I am in receipt of yours of the 6th, handed me this morning. I have forwarded it to Mrs. Jones, with a request that she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, *and what she may be short, I will assist to make up.* I send you her address." Application was accordingly made on the part of the plaintiff to Mrs. Jones for payment, but without effect; and in 1844, this action was brought against the defendant.

Upon this evidence the learned Judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit or a verdict for him, if the Court should be of opinion that these letters did not constitute a sufficient acknowledgment to take the case out of the Statute of Limitations.

Knowles now moved accordingly.—There is nothing in either of the defendant's letters which amounts to such an

unconditional acknowledgment of the debt as that a promise to pay it can be implied therefrom. There is no admission of liability in himself, but merely an engagement to assist the executrix of his co-maker, who was the person primarily liable. [*Parke, B.*—That engagement was made with reference to a note on which the defendant was originally liable; and it is such an acknowledgment as imports a promise to pay the debt due upon that note, in case the other party does not. When she does not pay, his promise becomes an absolute one, and admits the declaration.] The true construction of the letter is rather this: "She is the party liable to pay; but if she do not, I will;" and there is no authority that a promise by a party to pay the debt of another can take a debt of his own, although upon the same security, out of the Statute of Limitations. The principle is thus stated by *Parke, B.*, in *Morrell v. Frith* (a): "According to the recent cases, the document, to take the case out of the statute, must either contain a promise to pay the debt on request, or an acknowledgment from which such promise is to be inferred. Now the utmost that can be made of the letter in this case is, that it acknowledges the existence of the debt mentioned in the previous letters, but that the defendant does not mean to express any promise to pay, but reserves it for future consideration." [*Parke, B.*—There must, no doubt, be something proved which fits the promise stated in the declaration, which is a promise to pay on request. But if the evidence be of a promise to pay upon a condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. If the action had been brought immediately after the letter was written, so that there had been no time for the executrix to pay, the case might be different. *Pollock, C. B.*—The letter of the 8th of March must be

1845.
 HUMPHREYS
 v.
 JONES.

(a) 3 M. & W. 402.

1845.
 HUMPHREYS
 v.
 JONES.

read with reference to all the previous letters. Now in that letter the defendant says in effect, "I am only surety—Mrs. Jones is the person who ought to pay—an I renew my engagement as surety: apply to her, the principal, who ought to pay, and if she does not, I will pay." *Parke, B.*—It amounts to this: "I will pay whatever she does not, on application being made to her." Then should not that have been an application to her by means of legal process? [*Parke, B.*—No; the defendant promises to pay on non-payment by her when applied to for payment. It is not necessary to sue her, in order to make it an absolute promise by the defendant; when she fails to pay, it is absolute, and admits the declaration.] *Alderson, B.*—I doubt whether it even is a conditional promise at all.]

PER CURIAM (a),

Rule refused.

(a) *Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.*

GOODLIFF v. FULLER (b).

In an action for breach of promise of marriage, the Court refused a rule for the defendant to inspect letters written by the plaintiff to him, which he alleged contained a release of his promise, and which, after the breaking off of the connexion, the defendant had returned to her upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part.

COCKBURN moved for a rule calling upon the plaintiff to shew cause why the defendant should not have leave to inspect two letters, written by the plaintiff to the defendant in or about January, 1844. This was an action for breach of promise of marriage, and it was stated in the affidavits, that the defendant had paid his addresses to the plaintiff, but that, in consequence of some misunderstanding between them, the proposed marriage was broken

(b) This case was decided in Hilary Term, Jan. 13, but was accidentally omitted in its proper place.

1845.
 {
 GOODLIFF
 v.
 FULLER.

trustee for the other, in which case the Court generally allows the instrument to be inspected. There is no foundation at all for this application.

ALDERSON, B.—I entirely concur. The matter of this application is the subject of a bill in equity, and for us to grant it would be nothing short of allowing a bill of discovery. The defendant should have applied for a postponement of the trial, until he could file a bill in equity. In *Bousfield v. Godfrey*, the document of which inspection was demanded was that on which the action was brought. I may observe, that there is another case (a) in the books which occasions a great deal of trouble at Chambers; it is perpetually cited there as an authority for applications like the present, and I am sorry it is not corrected.

Rule refused (b).

(a) Probably *Barry v. Alexander*, Tidd's Pr. 592, where Lord Mansfield is stated to have ruled, that "whenever the defendant would be entitled to a discovery, he should have it here, without

going into equity."

(b) Ultimately the trial was postponed on payment by the defendant of costs of the day and of the costs of this application.

1845.

ROWLANDS v. SPRINGETT.

April 18.

ASSUMPSIT on a bill of exchange for £30, drawn by the defendant upon William Widenham, and payable to the defendant's order two months after date. The declaration alleged that the bill was indorsed by the defendant to Robert Rowlands, and by him to the plaintiff Edward Rowlands, and that Widenham did not pay the bill when due, although it was then presented to him for payment, whereof the defendant then had notice. Plea, no due notice of dishonour.

At the trial before *Pollock*, C. B., at the London sittings after last Hilary Term, Robert Rowlands, the first indorsee, was called as a witness for the plaintiff, and he proved, that having received notice from the plaintiff of the non-payment of the bill by Widenham, he, on the following day, left at the defendant's place of business his card, with the following memorandum written on the back of it:—"Bill for £30, drawn by Springett on William Widenham, dishonoured, lies due, as on the other side;" and on the other side was his own name and address: "Robert Rowlands, gold case maker, 35, Meredith Street, Clerkenwell." The witness said that the bill was not then in fact lying at his own house, but at his brother's, the plaintiff, No. 69, Old Broad Street; but that he gave his own address because he lived in the next street, and his brother was in the habit of leaving Old Broad Street at four o'clock in the afternoon. He admitted, on cross-examination, that he had since learned that there were other bills of the defendant in his brother's hands. On this evidence a verdict was given for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, if the Court should think the notice of dishonour insufficient.

A bill having been dishonoured, notice was given by the holder to the first indorsee, who in due time left at the residence of the drawer his own card and address, on the back of which was written, "Bill for £30, drawn by S. on W. dishonoured, lies due as on the other side." The bill was not lying there, but at the residence of the holder, who had other bill transactions with the drawer:—*Held* to be a sufficient notice of dishonour.

Dundas now moved accordingly.—First, the notice does not contain a sufficient description of the bill, especially as

1845.
ROWLANDS
v.
SPRINGETT.

there were other bill transactions between the defendant and the plaintiff. After *Furze v. Sharwood* (a), the Court will not hold this to be sufficient. There, a notice that the bill "lies due and unpaid at my house," with the holder's name and address subscribed, was held to be insufficient. [Parke, B.—This Court has held that the word "dishonoured" imports every thing that is necessary. This notice gives you the amount of the bill, the names of the drawer and drawee, and it tells you that the bill has been dishonoured, which means that it has arrived at maturity, that it has been presented, and that payment has been refused.] Secondly, although it may not be necessary to state where a bill is lying, still, when a party undertakes to describe it, and to say where it lies, he should do it correctly, which here he does not. And when a party undertakes to say where a bill lies, and gives wrong information, he must take the consequence of it.

PARKE, B.—A party might, perhaps, be bound by such a statement, if he were afterwards to sue on the bill, and the defendant were to prove in answer, that he tendered the money at the place where he told him the bill was lying. But the question here is, whether this is a sufficient notice of dishonour. Now, the bill is amply described, and it is stated that it is dishonoured; and I do not think that the inaccuracy in the description of the place where it is lying makes any difference. Suppose he had said, "The bill, drawn so and so, has been presented and has been dishonoured, and you may pay it, if you please, to Robert Rowlands, No. 35, Meredith Street, Clerkenwell;" could that have affected its validity? I think not.

POLLOCK, C. B., ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(a) 2 Q. B. 388; 2 Gale & D. 116.

1845.

HAGGER v. BAKER.

April 16.

A RULE had been obtained, calling upon the plaintiff to shew cause why the award made in this cause should not be set aside, on the ground of the misconduct of the arbitrator, in knowingly receiving evidence on behalf of the plaintiff which was inadmissible. It appeared from the affidavits, that the cause and all matters in difference having been referred to the arbitrator, the plaintiff, in support of his case, produced in evidence before the arbitrator certain books, which contained entries made by the plaintiff himself, and also by one Carrington, his clerk, from his dictation and from that of his servants; and that Carrington, who was too ill to attend as a witness, of his own knowledge knew nothing of the transactions so entered. On its being objected for the defendant, that these books were not evidence for the plaintiff, the arbitrator stated that the same strictness as to evidence was not required on an arbitration as at a trial at Nisi Prius; and that though the books were not strictly admissible in evidence by themselves, yet he had authority to receive them, and should do so; and the books were accordingly put in.

On a reference of a cause and all matters in difference to arbitration, the plaintiff tendered in evidence his books containing entries made by himself and others on his dictation, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial at Nisi Prius, and that, although the books were not strictly admissible, he had authority to receive them, and he accordingly did so; but it did not appear that he had acted upon them:—*Held*, that this did not amount to misconduct in the arbitrator, so as to authorize the Court to set aside the award.

Byles, Serjt., (*Birch* with him) shewed cause. There is no ground for setting aside the award in this case. The arbitrator may have mistaken his authority, but it is not imputed that he acted corruptly, and with the intention of favouring the plaintiff. Besides, the affidavits only state that the books were received by the arbitrator, but it does not appear that he acted upon or attached any weight to them, or formed his decision in consequence of the entries contained in them. [He was then stopped by the Court.]

Butt and *Hawkins*, in support of the rule.—This is not

1845.
 HAGGER
 v.
 BAKER.

a mere mistake in point of law; it is wilful misconduct in the arbitrator, who persisted in receiving evidence, which he knew to be inadmissible, after it was objected to. The case *In re Hall and Hinds* (a) is an authority, that when the mistake and carelessness are so gross as to amount, though not in a moral point of view, yet in the judicial sense of that term, to misconduct on the part of the arbitrator, the Court will sometimes interfere by setting aside the award.

POLLOCK, B.—I am of opinion that this rule ought to be discharged. In the case *In re Hall and Hinds*, the arbitrators had subtracted one sum from another, instead of adding it, and had, therefore, not done what they intended to do. I think that is the best ground on which to rest that decision, for it is otherwise difficult to reconcile it with previous cases. The general rule is, that if an arbitrator makes a mistake which is not apparent on the face of his award, the party injured has no redress; and there is no difference between a mistake in the law of evidence and in other matters. If no corruption be shewn, the Court ought not to interfere. Besides, it does not appear that the arbitrator founded his award upon the entries in these books; he may have examined them merely for the sake of informing his conscience, without any intention of acting upon them.

PARKE, B.—I am of the same opinion. We had occasion to consider the case *In re Hall and Hinds* in a recent case in this Court, *Phillips v. Evans* (a), and we declined to carry it any further. Besides, there is nothing to shew that the arbitrator acted upon the entries in question.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged with costs.

(a) 2 Man. & G. 847; 3 Scott, N. R. 250. (b) 12 M. & W. 309.

in the deed of settlement of the banking company, dated in 1836, in which the defendant Brook, who was described therein as William Brook, of Huddersfield, in the county of York, was named as a shareholder, and which was subscribed by him. The 27th article of this deed provided, "that the business of the Company should be carried on at Douglas, in the Isle of Man, and such other places as should be determined upon pursuant to the clause thereafter contained for that purpose." Then the 31st article provided, that by the unanimous vote of the directors of the said company, at a meeting convened in the manner therein directed, branch banks might be established at other places in the island.

It appeared that the branch at Castletown was established in 1839, but no evidence was given to shew that the formalities required by the 31st article were first complied with. This branch establishment was kept on foot until the stoppage of the bank in 1843, during the whole of which time the defendant Brook continued to hold shares in the company, and receive dividends upon them; and it was with this branch at Castletown that the plaintiff's deposit was made, the balance of which was claimed in this action.

It was objected for the defendant Brook, that there was no evidence to go to the jury to shew that the branch at Castletown was duly established pursuant to the authority given by the deed of settlement, or that the defendant had assented to its establishment, and therefore that he was not liable in this action. The learned Judge overruled the objection, and there was a verdict for the plaintiff for the amount claimed.

In the case of *Crellin v. Calvert*, which was for the balance of the plaintiff's deposit account with the bank at the head office at Douglas, the plaintiff began, and called a witness of the name of Fletcher, a late clerk in the bank, who proved the state of the account, and also that the per-

1845.
CRELLIN
v.
CALVERT.

1845.
 CRELLIN
 v.
 CALVERT.

sons mentioned in the plea were partners in the banking company. The witness was cross-examined as to the correctness of the account; and he proved also, on his cross-examination, that there were other partners besides those mentioned in the plea. It was shewn that a Thomas Calvert subscribed the deed of settlement; but there was no evidence to identify him as the defendant in this action. It was objected for the defendant, that without such evidence the plaintiff could recover: for the plaintiff it was answered, that the plea admitted the defendant's liability to some amount, as a member of the company, and that, the allegations of the plea being disproved, the plaintiff had only to prove the amount of the debt. The learned Judge was of this opinion, and the verdict was accordingly entered for the plaintiff for 67*l.* 7*s.* 3*d.*

In last Michaelmas Term, *Watson* obtained rules nisi for new trials in both cases, on the same grounds of objection that were urged at Nisi Prius; and the rules now came on for argument together.

Martin and *Cowling* shewed cause.—First, with respect to the case of *Crellin v. Calvert*, supposing that the plea leaves it ambiguous, the evidence, taken in connexion with the particulars, shews clearly that the parties with whom the plaintiff contracted, and with reference to whom the plea is pleaded, were the shareholders in the Isle of Man Bank. It was shewn that the thirteen persons named in the plea were all partners in that bank. [*Pollack*, C. B.—If that was not the partnership to which the defendant's plea refers, his counsel ought to have said so at the time.] And *Sewell v. Evans* (a) and *Roden v. Ryde* (b) are authorities to shew that the proof of a person of the same name as the defendant being a partner was *primâ facie* sufficient, without further evidence of identity.

(a) 4 Q. B. 626.

(b) *Ib.*; 3 G. & D. 604.

1845.
 CRELLIN
 v.
 CALVERT.

the question, whether the defendant can give the plaintiff a better writ.—They cited *Dunford v. Trattles* (a).

Watson and Cleasby, contra.—The question in the case of *Crellin v. Calvert* is simply this: was there evidence of the debt recovered being due *from the defendant* to the plaintiff? The defendant submits that there was none, no evidence being given to shew that he was a partner in the banking company. It is said that the plea in abatement admits his liability; but that is not so: the effect of the plea is merely this, that *any promise which the plaintiff can prove* was made by the defendant jointly with the other persons mentioned in it. When the plea in abatement fails in proof, it remains the case of a *judgment by default*, and the plaintiff is still bound to establish the defendant's liability, by connecting him as a partner in the company with which the plaintiff contracted: *Passmore v. Bousfield* (b). Where the plea in abatement is untrue in fact, there is no judgment of respondeat ouster; the defendant is not let in to try in bar; but it is as the case of a judgment by default, and the damages are to be assessed by the jury. With respect to the particulars, they can only restrain the plaintiff in point of proof; they cannot be imported into the declaration, or give a wider effect to the plea: *Russell v. Bell* (c). Here, however, the particulars have no reference to the Isle of Man Bank, and the plaintiff might have proved a banking account with a different bank. The defendant here, as upon a judgment by default, only admits a liability for nominal damages; and to recover more, the plaintiff must prove him to have been a joint contractor as to the debt claimed in the action: *Godson v. Smith* (d), *Morris v. Lotan* (e), *Roby v. Howard* (f). *Dunford v. Trattles* was the case of an ad-

(a) 12 M. & W. 529.

(b) 1 Stark. 296.

(c) 10 M. & W. 349.

(d) 2 Moore, 157.

(e) 1 M. & Rob. 233.

(f) 2 Stark. 555.

1845.
 CRELLIN
 v.
 CALVERT.

that he knew the contrary. [*Pollock*, C. B.—What is there to shew they were not acting in conformity with the deed?] *The plaintiff* must shew that the directors had authority so to bind the defendant, which they could not do except after the unanimous vote of the whole body. [*Pollock*, C. B.—The question is, whether it is not for the defendant to shew how the fact is, not for the plaintiff, who knows nothing about it.] So it might have been said in *Dickinson v. Valpy*. The plaintiff, who seeks to charge the defendant as a partner under the deed, is to fix him by shewing the authority. The presumption from lapse of time might equally have been made in all the cases which have been cited.

POLLOCK, C. B.—I am of opinion that the rule in each of these cases ought to be discharged. In the first case, of *Crellin v. Calvert*, I consider that the single question is, whether there was evidence to go to the jury that the defendant was a partner in the Isle of Man Joint Stock Bank. It is admitted on the part of the defendant, that, if the learned Judge had ruled that the defendant was to begin, and if he had called a witness to prove that the thirteen persons named in the plea were partners in the Isle of Man Joint Stock Bank, and then the plaintiff had cross-examined those witnesses to prove that there were two others, that would have been conclusive between the parties that the plea in abatement related to the Isle of Man Joint Stock Bank, as to which the defendant of course would have admitted that he was one of the partners, otherwise the whole proof would be perfectly idle and nugatory; because, when he called the witness to prove that they were partners, in order to support his plea in abatement, it must be taken that he, at least, was one of the partners along with them. In the present case, instead of that being the course of proceeding, the plaintiff began, and negated the plea in abatement in the first instance,

1845.
CRELLIN
v.
CALVERT.

consequently that the direction of the learned Judge was perfectly right, and there ought to be no new trial in this case.

With respect to the case of *Crellin v. Brook*, it appears to me that the rule in that case also ought to be discharged. I confine myself to the facts of the case, as they were proved in evidence. There was a plea in abatement, and, in order to prove that the defendant was liable, the deed was put in, which was signed by him long before. And with respect to what was contended by Mr. *Cleasby*, that he was not shewn to be a continuing partner, surely, if he be shewn to be a partner in 1836, it is to be presumed he was a continuing partner, unless the partnership was dissolved. He continues, therefore, to be a partner down to the period of the transaction in question, and down to the time of the commencement of the action. Here the money was deposited at a branch bank in Castletown; and it is said that the company had not the power to establish a branch bank elsewhere than at Douglas. I do not know why that should be assumed. Had they not the power of transferring their whole business from Douglas to Castletown? If they had, could not they transfer so much of it as could more conveniently be carried on at Castletown? I do not know why the contrary should be assumed, at a period when we are so perfectly familiar with branch banks. It is true, the London bankers have very rarely a branch bank, but branch banks of country banks are extremely common, and the Bank of England has many branch banks in various parts of the country. It appears, however, that there was no power in the deed itself, which was produced in evidence, to establish the Castletown branch, except by the unanimous concurrence of the directors, obtained in a particular manner. Now, as against the defendant, it appears to me that the verdict may be sustained in either of two ways: as against him, it may well be presumed that the conditions upon which the

1845.
CRELLIN
v.
CALVERT.

plaintiff together led substantially to a different result; for it was proved that the contract was made with others besides those mentioned in the plea, and consequently the plea in abatement was not proved. It appears to me that the result of that was merely that the plea was removed out of the case, and that exactly the same obligation was upon the plaintiff as would have been upon him if there had been no plea at all. Now, that being so, let us see what the evidence was. The evidence was this:—a gentleman of the name of Fletcher was called, who said he was the manager of the Isle of Man Joint Stock Bank; that the plaintiff kept an account there, and at the time of its stoppage had a credit with the bank of £676; no doubt, therefore, the persons who were partners in the Isle of Man Bank were by that evidence proved to be liable to the plaintiff for £676; but that does not seem to me at all to affect the defendant. The defendant says, “My promise was made jointly with A. B., C. D., and so on, to the number of thirteen; it is true, farther, that those thirteen and others were partners in the Isle of Man Bank:”—how does that shew that the defendant was any partner in the Isle of Man Bank? The defendant admits he was liable with thirteen others, partners in the Isle of Man Joint Stock Bank; but non constat he was liable with those thirteen and others as constituting that partnership. This matter will appear more clear in its detail although I think not more clear in its principle, if one person only, instead of thirteen, be supposed to have been mentioned as a co-contractor. Suppose the defendant pleaded that he made the promise jointly with A.; and upon the trial, the defendant having failed to give any evidence, the plaintiff proved that A. and thirteen others were partners in the Isle of Man Joint Stock Bank:—“Why,” the defendant would say, “what has that to do with me? I say I made a promise jointly with A.; how can you say to me that A. and thirteen others are part-

CASES IN THE EXCHEQUER,

r.
N
and the defendant Brook having been proved to be a shareholder by executing the deed at the commencement of the concern, she was entitled to recover it from him. But then the defence in this action was of a different nature to that in the first action; it was said by the defendant, that the plaintiff deposited the money, not with the original bank at Douglas, to which the deed of partnership related, but at a branch bank which was afterwards established at Castletown; and the defendant says, "Although I was a party to that deed, and thereby became a partner in the bank at Douglas, there is no proof that I ever consented to become a partner in any branch bank at Castletown." I think that is a perfectly good objection, if it be made out in point of fact; because I conceive it to be quite clear, that, on becoming a partner in a joint-stock bank in London, I do no more as between myself and partners—I authorize them to do no more—than that which is properly and ordinarily done in carrying on the bank in which I so became a partner; it is no part of the authority which I impliedly give to my partners in a bank in London, that they establish without my consent a branch bank at Newcastle. If I act in such a way as to adopt or ratify their act, I am bound by it; but if I do not adopt or ratify it, I am not bound, because that is not in any respect within the scope of the business to be carried on in London. The becoming a partner in a bank carrying on business in London does not authorize, as it appears to me, the carrying on of a branch anywhere else, or make the partners liable in respect of the business done at such a branch, unless they consent to it: and it is obvious, upon looking at the terms of this deed, that the shareholders meant to exclude the parties carrying on business at Douglas from any such authority, because by the 27th article it is stipulated, "that the business of the company shall be commenced and carried on at Douglas, in the Isle of Man, and such other places as shall be determined on

under the clause hereinafter contained." Then the 31st clause stipulates, that, by the unanimous vote of the directors, made after a certain number of votes had been given, and under certain circumstances, branch establishments might be carried on. It is quite clear, therefore, that, unless all these stipulations of the 31st article were complied with, whatever the ordinary law might be upon the subject, the parties in the bank at Douglas did not authorize a branch to be carried on at Castletown.

But then, in order to fix this defendant for a liability arising out of the transaction at Castletown, one of these things might be proved; either that he was liable, because he became a party to the deed, which deed by its stipulations authorized and sanctioned the carrying on a branch bank at Castletown, and that it was established and carried on in the manner thereby authorized and sanctioned; or that, whether rightly or wrongly, the directors established a branch bank at Castletown, and that he ratified it.

Now, there is no pretence that any evidence was given upon the first point; there is no pretence that there was any proof of a unanimous vote of the directors, and I cannot see how we can presume anything on the subject. Here it is sought to fix the defendant as a partner, not by reason of his acts, but by reason of his having executed a deed whereby others are entitled to bind him; and you must shew that the conditional authority given by the deed to those parties has been complied with. The only doubt I have had was this,—whether there was or was not evidence to warrant the jury in finding, that whether this was done in accordance with the provisions of the deed or not, it was in fact done, and the defendant knew of it, and did not interfere. If that be established, then I think he is liable. I doubted whether there was any evidence to go to the jury of his knowledge, the evidence being merely that he executed the deed in 1836, and that a branch was established at Castletown in 1839. I own I had great

1845.
CRELLIN
v.
CALVERT.

1845.

April 18.

TANNER and Others, Assignees of E. M'LAUGHLIN, a
Bankrupt, v. SCOVELL and Others.

Goods were forwarded in bales by ship to London, deliverable to B & Co., or their assigns, who were factors for sale; and were landed at the defendants' wharf. B. & Co. gave the defendants orders to "weigh and deliver" the goods to M., who had contracted with B & Co. for the purchase of them. They were accordingly weighed, and an account of the weights sent to B. & Co., who made out invoices to M. accordingly. M. re-sold several bales of the goods, which were delivered by the defendants, upon his order, to his vendees: the rest remained on the defendants' wharf until they were stopped by B. & Co. as unpaid vendors. They were never transferred in the defendants' books

from the names of B. & Co. to that of M., nor was any warehouse rent paid by him:—*Held*, first, that, upon these facts, the defendants never stood in the relation of wharfingers to M., so as to be liable to an action on the case by him for the non-delivery of the goods to his order.

Secondly, that, under these circumstances, B. & Co.'s right of stoppage in transitu was not determined by the part delivery to M.'s vendees.

CASE.—The first count of the declaration stated, that the said E. M'Laughlin, before he became bankrupt, to wit, on the 1st January, 1844, and on divers days and times between that day and the 1st August, 1844, at the special instance and request of the defendants, left and continued in the care, custody, and keeping of the defendants, and the defendants, before the said E. M'Laughlin became bankrupt, to wit, on the 1st August, 1844, at their special instance and request, had in their care, custody, and keeping, divers goods and chattels of the said E. M'Laughlin by his permission, to wit, glue pieces, weighing a certain great weight, to wit, twenty tons, of great value &c., to be taken care of and safely and securely kept by the defendants, for certain reward and at certain charges, for the said E. M'Laughlin, and to be delivered by the defendants to the said E. M'Laughlin when the defendants should be thereunto requested, upon payment of such reward and charge as might be due to the defendants in respect of the said goods and chattels. The count then set forth the bankruptcy of M'Laughlin, the issuing of the fiat, the adjudication, and the appointment of the plaintiffs as assignees; and averred a request by the plaintiffs for the delivery of the said goods by the defendants to them as such assignees, and that they were ready and willing and tendered and offered to pay to the defendants such reward and charges, and whatever might be or was due to the defendants in respect of the said goods and chattels. Breach, in non-delivery of the said goods to the plaintiffs. There

1845.
TANNER
v.
SCOVELL.

and authority of the said E. M'Laughlin, and before the date or issuing of the fiat, and before the defendants or either of them had notice of any prior act of bankruptcy by him committed, to wit, on &c., the said E. M'Laughlin ordered and directed the defendants to deliver the said goods and chattels to certain persons, to wit, to William Boutcher, William Mortimore, and Robert Vicary; and the defendants then, in pursuance of and obedience to such order and direction as aforesaid, and by the leave and license of the said E. M'Laughlin to them for that purpose then given, before the date or issuing of the said fiat, and before they the defendants or either of them had notice of any act of bankruptcy by the said E. M'Laughlin committed, really and bonâ fide delivered the said goods and chattels, and every part thereof, to the said William Boutcher, William Mortimore, and Robert Vicary, and have never since had the same or any part thereof in their custody, care, or keeping. Wherefore, and not otherwise, the defendants, at the said time when &c., omitted and refused to deliver the same to the plaintiffs, &c.—Verification.

There were also two other pleas to the first count: the fourth plea denying the allegation that M'Laughlin left the goods in the care, &c. of the defendants as therein mentioned; and the fifth, the allegation that the plaintiffs tendered and offered to pay to the defendants *modo et formâ*: and pleas to the second count, the sixth denying the property of the bankrupt, the seventh setting up leave and license; and lastly, a plea to the third count, denying the property of the plaintiffs as assignees.

The plaintiffs joined issue on the first, fourth, fifth, sixth, and last pleas; and to the second, third, and seventh replied *de injuriâ*, and issues were joined thereon.

At the trial, before *Pollock*, C. B., at the sittings in London after Hilary Term, it appeared that the action was brought by the plaintiffs as the assignees of E. M'Laughlin, who, before his bankruptcy, carried on the business of a

1845.
 TANNER
 v.
 SCOVELL.

for London, under a bill of lading dated 23rd March, 1844, whereby they were made deliverable to Boutcher & Co., their assigns. The vessel arrived off Topping's Wharf on the 15th of April. On the 16th, Boutcher & Co. gave M'Laughlin the following order:—

“ To the Superintendent of Cotton's (a) Wharf.

“ Bermondsey, April 16, 1844.

“ Please weigh and deliver to Mr. M'Laughlin 48 bales glue pieces.

“ For Boutcher, Mortimore, & Co.,

“ RICHARD WELCH.”

“ Ship ‘ William the Fourth,’ Capt. Rees,
 from Bridgewater.”

The defendants, on receipt of this order, weighed the 48 bales, and found the weight to be 98 cwt. 3 qrs. 13 lb., which was communicated to Boutcher & Co., who thereupon sent to M'Laughlin an invoice stating the weight and price, viz. 168*l.* 1*s.* 6*d.* On the 31st of May, five of these 48 bales, weighing 9 cwt. 2 qrs. 16 lb., were delivered by the defendants, on the order of M'Laughlin, to a Mr. Platt, to whom he had sold them. The other 43 remained at the wharf until they were stopped by Boutcher & Co. as hereinafter mentioned.

On the 11th of April, 64 more bales of the glue pieces were shipped from Taunton by the Taunton packet, and 38 by the “ Benjamin,” consigned to Boutcher & Co. under similar bills of lading. The former arrived at Topping's Wharf on the 26th April, and on the 27th were weighed by the defendants at 127 cwt. 3 qrs. 10 lb. On the 2nd May, Boutcher & Co. sent a delivery order, in the same terms

(a) Topping's Wharf having been destroyed by fire, the defendants, during its rebuilding, carried on the business at their other establishment of Cotton's Wharf. The glue pieces in question were the first goods landed at Topping's Wharf after its being rebuilt.

as before, except that it did not specify the number of bales; and on the 4th of May they delivered to M'Laughlin an invoice thereof, stating the weight and price accordingly, viz. 217*l.* 6*s.* 6*d.* On the 30th of April 10 more bales (in addition to the 38 before shipped) were forwarded from Taunton by "The Benjamin," and 35 by another vessel, "The Shamrock." These vessels arrived in London on the 13th and 27th of May respectively, and similar orders were given by Boutcher & Co. to the defendants, on the 15th of May and 12th of June, for the delivery of the bales brought by them to M'Laughlin, and similar invoices were made out, according to the weights taken at the wharf.

No transfer of any of these goods was made in the defendants' books from Boutcher & Co. to M'Laughlin, nor was any wharfage rent charged to him. There was evidence also that M'Laughlin claimed an allowance from the weights, in consequence of a portion of the goods being wet, and requested that they might be marked, in order that the question might remain open until they could be re-weighed; but M'Laughlin stated that he had afterwards given up this objection.

On the 27th of May, M'Laughlin sold to Mr. Platt 40 of the 48 bales which arrived by "The Benjamin," and they were delivered to him by the defendants, on M'Laughlin's order, at various times between the 29th of May and 9th of July. The other 8 bales, and those also which came by "The Shamrock," remained at the wharf until they were stopped by Boutcher & Co. as hereinafter mentioned.

On the 19th of July, Boutcher & Co., to whom M'Laughlin was then indebted on the balance of his account in upwards of £700, in consequence of his failure in making a payment to them according to his engagement, wrote a letter to the defendants, directing them not to deliver any more glue pieces to M'Laughlin. On the 13th of August, M'Laughlin committed an act of bankruptcy, on which a fiat issued on the 26th of September. On the 20th of December, the plaintiffs, as assignees, demanded from the

1845.
TANNER
v.
SCOVELL.

1845.
 TANNER
 v.
 SCOVELL.

defendants the delivery of all the glue pieces at the wharf, (150 in all), offering to pay all rent, wharfage, and other charges which might be due to them in respect thereof. The defendants refused to deliver them, under an indemnity from Boutcher & Co., whereupon this action was brought. —No evidence was given in support of the second plea.

The Lord Chief Baron, in summing-up, left it to the jury to say, first, whether there was any difference between an order to “weigh and deliver,” and an order to “weigh and transfer,” and whether the former implied a complete delivery of the goods to the bankrupt; stating to them also, that, if the bankrupt never took the weights, objected to them, and desired that the goods might be marked that he might keep his objection open, in point of law he never acquiesced in that which was necessary to constitute it a perfect delivery; and that, if there was no complete delivery, inasmuch as the order to stop the goods was before the act of bankruptcy, the plaintiffs were not entitled to recover.

The jury found that the delivery was not complete, and the verdict was therefore entered for the defendants on the fourth, sixth, and eighth issues, and for the plaintiffs on the other issues.

In this term (April 17)

Jervis moved for a new trial, on the ground of misdirection.—First, the plaintiffs were entitled to recover on the fourth issue, which raises the question, whether the goods were left and continued by the bankrupt in the custody of the defendants on the terms stated in the first count of the declaration. The order to “weigh and deliver” to the bankrupt implied a perfect delivery: *Hanson v. Meyer* (a), *Hammond v. Anderson* (b), *Lucas v. Dorrien* (c). [*Parke, B.*—It may be that the property

(a) 6 East, 614; 2 Smith, 670.
 (b) 1 N. R. 69.

(c) 7 Taunt. 278; 1 Moore, 29.

passed to him; but to sustain this issue, the plaintiffs must shew that the defendants held the goods for him: there must be some evidence of a contract between the bankrupt and the defendants. Where is there any evidence of employment of them by him, they having been originally employed by Boutcher & Co.?] At all events, the plaintiffs are entitled to recover on the pleas of not possessed to the counts in trover. Those pleas put in issue the right of Boutcher & Co. to stop the goods; and here there was no right of stoppage, for as against the vendors there was a perfect delivery to the bankrupt. With reference to the counts in trover, the delivery of part of the bulk was a delivery of the whole. [*Parke, B.*—That depends on the intention: if the intention was to separate the portion delivered from the bulk, it is not necessarily a delivery of the remainder.] But here the separation is not by the *deliverer*, but by the *receiver*. There is certainly no intention on his part—who has bought the whole, and may take the whole if he pleases—to sever a portion from the remainder, and receive that portion only. His intention clearly is to take the whole, and at once to dispose of part, the rest remaining at his risk. [*Parke, B.*, referred to *Jones v. Jones* (a), *Wentworth v. Outhwaite* (b), and *Whitehead v. Anderson* (c).] None of those were cases in which it was held that where the *purchaser* takes a portion of the goods, the *transitus* is not determined.

Again, it was wrongly put to the jury, that there was evidence of a dispute about the weight of the goods. There was no dispute about their weight, but merely a claim for an allowance because they were wet; and the bankrupt sells a part without any adjustment of that claim. [*Parke, B.*—It is a dispute about the *real* weight.]

PER CURIAM.—There will be no rule as to the failure on

(a) 8 M. & W. 431. (b) 10 M. & W. 436. (c) 9 M. & W. 518.

1845.
 TANNER
 v.
 SCOVELL.

the first count, because it is not made out that there was any relation of wharfingers to the bankrupt. As to the other point, we will take time to look into the authorities.

Cur. adv. vult.

The judgment was now delivered by

POLLOCK, C. B.—In this case, upon looking into the authorities, we are all agreed that the delivery of part of the goods was not intended to be, and did not operate as, a simple delivery of the whole, but was a separation for the purpose of that part only, leaving all the rest in statu quo; and therefore, the only remaining point on which the Court had any doubt being cleared up to the satisfaction of my learned Brothers, there will be no rule.

The first and leading case on this subject is that of *Slubey v. Heyward* (a), in which a part delivery was considered as putting an end to the right of stoppage in transitu. That was nothing else, in truth, than the delivery of the whole cargo: each part was taken away with the intention to take possession of the whole, not to separate the part that was delivered from the remainder. Lord *Tenterden* says, in the case of *Bunney v. Poyntz* (b), that that was “the delivery of part of the cargo, made in the progress of and with a view to the delivery of the whole;” because you could not take the whole of the cargo at one time, but must take hogshead by hogshead, or sack by sack, as the case may be. If there was no intention to separate the particular part delivered from the remainder, that incipient delivery, so to speak,—that inchoate delivery,—will amount to a determination of the right to stop in transitu. Before the time of the decision in

(a) 2 H. Bl. 504.

(b) 4 B. & Ad. 571; 1 Nev. & M. 229.

Slubey v. Heyward (a), the subject of stoppage in transitu had not undergone the great consideration it has of late years: and hardly anything was held sufficient to determine the right, unless there was an actual taking possession by the purchaser himself, by going and weighing the commodity or otherwise, and so taking manual possession of it. In all the subsequent cases in which part deliveries have been held not to be sufficient to prevent the right of stoppage, (there are several of them), the vendee meant to separate the part delivered from the remainder, and to take possession of that part only, and in most of them the vendor concurred in that act. I may observe, that *Taunton, J.*, in the case of *Belts v. Gibbins* (b), made an observation which is very justly questioned by Mr. Smith, in his book on Mercantile Law, viz. that "a partial delivery is a delivery of the whole, unless circumstances shew that it is not so meant." Mr. Smith appends a quære to that dictum, and with very great reason. It will be found that the only two cases, so far as I have looked at them, which bear the semblance of an authority that a mere part delivery is sufficient to put an end to the right to stoppage in transitu, are these, *Slubey v. Heyward* and *Hammond v. Anderson* (c). In the case of *Bunney v. Poyntz*, part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In *Jones v. Jones* (d), on the other hand, this Court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo, with the intention of obtaining possession of the whole, for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit: but it was fully admitted in that case, that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the

1845.
TANNER
v.
SCOVELL.

(a) 2 H. Bl. 504.

(c) 1 N. R. 69.

(b) 2 Ad. & Ell. 57; 4 Nev. & M. 64.

(d) 8 M. & W. 431.

1845.
TANNER
v.
SCOVELL.

right to stop in transitu. The same doctrine is laid down in *Miles v. Gorton* (a) and in *Dixon v. Yates* (b). There the vendee took samples, coopered and marked the casks in which the goods were, and sold them to different purchasers, one of whom obtained possession of a part; and yet it was held that the lien of the unpaid vendor still subsisted. Here, it is true, there is a general order to deliver to the vendee's order the whole commodity—which means, either the whole, or any part, if the vendee chooses to select a part, intending to select that part only; and in such case, the delivery of that part only does not operate as a delivery of the whole. If the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the transitus only with respect to that part, and no more: the right of lien and the right of stoppage in transitu on the remainder still continue. Besides the cases I have referred to, I have no doubt others may be found in which this doctrine is clearly established. The whole, in truth, depends on the intention of the vendee. We are of opinion, therefore, that the verdict in this case is right, and that no rule should be granted.

Rule refused.

(a) 2 C. & M. 504.

(b) 5 B. & Adol. 313; 2 Nev. & M. 177.

1845.

Doe *d.* JUKES *v.* SUMNER.

April 19.

THIS was an ejectment to recover possession of a house and premises in the parish of Walsall, in the county of Stafford. The demise was laid on the 30th of July, 1844. At the trial, before *Pollock*, C. B., at the last Staffordshire Assizes, the following facts appeared:—

The stat. 3 & 4 Will. 4, c. 27, s. 8, applies to tenancies from year to year created before and existing at the passing of the act.

By a settlement, made on the marriage of Gilbert Fownes and Ann his intended wife, in the year 1788, and a recovery duly suffered in pursuance thereof, the premises in question were limited and settled (after the marriage) to such uses as the said Ann should by deed appoint. The marriage took effect, and by a deed made on the 27th of March, 1790, Ann Fownes appointed the property to the use of John Finch and Joseph Jukes, and their heirs, upon trust, after her decease, to sell the same, and apply the purchase-money in such manner and for such purposes as she should by her will direct and appoint; and in default of appointment, she directed that it should form part of the remainder of her personal estate. Ann Fownes survived her husband, and by her will, dated 6th of October, 1808, disposed of her real and personal estate generally, but made no appointment as to the property in question, or the purchase-money to arise from the sale of it; and she appointed Peter Kempson and two other persons her executors, and died in 1811. Kempson survived his co-executors, and, in the year 1814, let the defendant's father into possession as tenant from year to year, without any lease or other writing of the premises in question, which (the deed of 1790 having been overlooked) were supposed to have passed under the general devise of real estate in the will. He continued in possession and paid rent to Kempson until the 25th of March, 1824, since which time no demand or payment of rent appeared to have been made,

1845.
 {
 DOE
 d.
 JUKES
 v.
 SUMNER.

Kempson having died in the month of May in the same year. The defendant's father died a few years ago, leaving the defendant in possession of the premises. Rent was demanded of him by the parties beneficially interested under the deed of 1790, and payment being refused, this ejectment was brought in the name of the heir-at-law of Joseph Jukes, who was the survivor of the trustees named in the deed of 1790.

It was objected for the defendant, that the right of action was barred by the stat. 3 & 4 Will. 4, c. 27, s. 8: and the Lord Chief Baron, being of that opinion, nonsuited the plaintiff, reserving him leave to move to enter a verdict.

Talfourd, Serjt., now moved accordingly.—The question in this case depends upon what is the true construction of the 8th section of the stat. 3 & 4 Will. 4, c. 27. That section enacts, "that where any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have accrued at the determination of the first of such years or periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen." The question is, whether that section is retrospective, and operates in cases where, at the time of its passing, there was a subsisting tenancy. If it does not, the lessor of the plaintiff was not barred in this action. Now it only defines the time at which the right to make an entry or distress, or to bring an action, *shall be* deemed to have accrued; and it has reference to the second section, which enacts, that, "*after the 31st day of December, 1833*, no person shall make an entry or distress, or bring an

action to recover any land or rent, but within twenty years next after the right to make such entry or distress, or bring such action, shall first have accrued." All these are prospective words. In *Doe d. Evans v. Page* (a) it appears to have been taken for granted that the *seventh* section of the statute, which applies to tenancies at will, had not a retrospective effect; and the terms of the two clauses are identical in effect. In *Doe d. Bennett v. Turner* (b) the point was not raised. Lord Denman, C. J., says, in *Doe v. Page*, that "the section [the seventh] is in terms only applicable to the case of a future, or at the most of an existing tenancy at will, and not to the case of a tenancy at will which had been determined, and not existing when the act passed." [Parke, B.—Here the defendant was in possession, as tenant from year to year, after the passing of the act. Alderson, B.—Your argument would exclude three-fourths of England from the operation of the act. Pollock, C. B.—There are many cases in which lands have been held under an existing tenancy from year to year for fifty or a hundred years. According to your argument, the statute is not to apply to any of them, but only to tenancies which begin and last for twenty years after the passing of the act. Alderson, B.—If a man allows his rent to remain unpaid for twenty years, the act says he shall lose his land. Rolfe, B.—It was necessary to draw an arbitrary line somewhere, and the Legislature fixed upon that.]

PARKE, B.—I think no rule ought to be granted. This case is clearly within the words of the 8th section, which are not the same as those of the 7th section, upon which *Doe v. Page* was decided. The 8th section says, that "when any person *shall be in possession* or in receipt of the rents and profits of any land, or in the receipt of any rent,

1845.
DOE
d.
JUKES
v.
SUMNER.

(a) 13 Law J., (N. S.), Q. B., 153.

(b) 7 M. & W. 226.

1845.
 {
 DOE
d.
 JUKES
v.
 SUMNER.

as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, &c. shall be deemed to have accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen." Here the defendant's father was in possession of the land as tenant from year to year after the passing of the act; therefore the period of limitation is twenty years from the last receipt of rent from him, in April, 1824; it expired, therefore, in April, 1844, and this ejectment was consequently brought too late. The effect of the act is to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed.

The other Barons concurred.

Rule refused.

April 21.

NICHOLLS *v.* CROSS.

Where a piece of land was demised for ninety-nine years, at an annual rent of £8, and the lease contained a covenant that the lessee should, within a year from the granting of the lease, build a dwelling-house on the land, and expend the sum of £150 at the least upon it—*Held*, that a stamp of £1 was sufficient.

COVENANT for rent reserved on a lease.—Pleas, non est factum, and that the lease was obtained by fraud and covin.

At the trial, before *Tindal*, C. J., at the last assizes at Warwick, the plaintiff produced the lease in evidence, from which it appeared that a small piece of land was demised by it to the defendant for building upon, for a term of 99 years if the lessee and his wife should so long live, at the annual rent of £8: and the lease contained a covenant that the lessee should, within a year from the granting of the lease, build a dwelling-house upon the land, and expend the sum of £150 at the least upon it. The lease was stamped with a one-pound stamp. It was objected for the defendant, that

the stamp was insufficient, and that the deed should have borne a stamp of 1*l.* 15*s.* The learned Judge overruled the objection, and the plaintiff obtained a verdict.

1845.
NICHOLLS
v.
CROSS.

Hill now moved for a new trial, on the same ground.—The case falls within the clause in the Stamp Act (55 Geo. 3, c. 184, Schedule, tit. "Lease") which provides that a lease of lands granted "in consideration of a sum of money by way of fine, premium, or grassum paid for the same, without any yearly rent, or with any yearly rent under £20," is to pay "the same duty as for a conveyance on the sale of lands for a sum of money of the same amount." And in the schedule to the same act, tit. "Conveyance," where the consideration-money amounts to £150, then the stamp is £2; but if this be not a money consideration, then it falls within the description in the schedule, of "Deeds not otherwise charged nor expressly exempted from all duty," in which case the stamp is 1*l.* 15*s.* The rent, and the £150 which is to be expended by the lessee, together form the consideration, and a stamp of 1*l.* 15*s.* was therefore required. If the annual rent alone is to be taken to be the consideration, the stamp would be £1 only. If there be another consideration, then, if it be of a pecuniary nature, the lease is to be charged as a conveyance, according to the amount of the fine. But if it be not of a pecuniary nature, then the lease is to be charged under the clause in the schedule, tit. "Lease," as a "Lease or tack of any kind not otherwise charged in this schedule, 1*l.* 15*s.*" And in either view of the case, it ought therefore to have had a stamp of 1*l.* 15*s.* attached to it.

POLLOCK, C. B.—Where the consideration is not by way of fine, premium, or grassum, but is something which relates to the improvement of the estate, the Legislature has not thought proper to provide for such a case, on account of the difficulty of framing an equitable provision

1845.
 NICHOLLS
 v.
 CROSS.

for it. They appear to have intended that a stamp should be necessary only in cases where either a rent was reserved or a fine or premium was given, and not to make any other arrangement between the landlord and tenant liable to any duty at all. We will, however, consider the point.

On a subsequent day, (April 27), *Pollock*, C. B., said that the Court had considered the question, and were of opinion that there ought to be no rule.

Rule refused.

May 3.

BAILEY and Others v. PORTER.

Where a bill of exchange drawn by W. C. upon one J. C. was accepted by the latter, payable at the plaintiffs' bank, and the bill was subsequently indorsed by W. C. to the plaintiffs, and on the day when it became due there were no assets of J. C.'s in the bank—*Held*, in an action by the plaintiffs as the indorsees against the indorser, that it was not necessary to shew a presentment of the bill to the acceptor.

It was proved at the trial by a clerk of the plaintiffs, no-

THIS was an action by the indorsees against the indorser of a bill of exchange, dated the 14th of March, 1842, drawn by one W. Court upon one James Court, payable three months after date to the order of the said W. Court, and indorsed by the said W. Court to the defendant, and by him to the plaintiffs.

The defendant pleaded, first, that the bill was not presented to James Court on the day when it became due; secondly, that the defendant had not due notice of presentment and dishonour, on which issues were joined. At the trial, before *Platt*, B., at the last Spring Assizes for the county of Monmouth, it appeared that the plaintiffs were bankers; that the bill was accepted payable at their bank, and on the day it became due they were holders of the bill; and their clerk on that day examined their books, and ascertained that there were no assets of James Court's in their hands to meet the bill. No written notice of dishonour was produced, but (notice to produce having been

tice to produce having been given, that on the day when the bill became due he wrote a letter to the defendant informing him that "J. C.'s acceptance due that day was unpaid, and requesting his immediate attention to it:"—*Held*, a sufficient notice of dishonour.

1845.
 {
 BAILEY
 v.
 PORTER.

to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expenses, and the money I must pay immediately. My son will be in London on Friday morning." That is a stronger case than the present. [*Alderson*, B.—The plaintiff does not say there that he looks to the defendant for payment. *Pollock*, C. B.—In this case the writer "requests his immediate attention to it."] The nearest case to the present is that of *Strange v. Price* (a). That was an action by the indorsee against the indorser, and the letter was as follows:—"Messrs. Strange & Co. inform Mr. James Price, that Mr. John Betterton's acceptance, 87*l.* 5*s.*, is not paid. As indorser, Mr. Price is called upon to pay the money, which will be expected immediately." That was held not to be a sufficient notice to Price of the dishonour of the bill. If any inference is to be drawn from the circumstance of the letter calling upon the defendant for the money, the words in that case are stronger than those in the present.—He also cited *Solarte v. Palmer* (b), *Phillips v. Gould* (c), and *Boulton v. Welch* (d).

Cur. adv. vult.

POLLOCK, C. B., now said—In the case of *Bailey v. Porter*, we are of opinion that there ought to be no rule. The notice in this case appears to us to be a distinct notice that the bill had been dishonoured; and the expression in it, requesting his "immediate attention to it," must be understood by any person acquainted with business as directing the indorser's attention to the bill, and calling upon him to pay the amount of it. The terms of the notice were, I think, in compliance with the rules laid down in the various cases upon this subject.

Rule refused.

(a) 10 Ad. & Ell. 125; 2 Per. & D. 287.

(c) 8 C. & P. 355.

(b) 7 Bing. 530; 1 B. N. C. 425.
 194.

(d) 3 Bing. N. C. 688; 4 Scott,

1845.
 WEST
 v.
 STEWARD.

The learned Judge overruled the objections, and under his direction a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him, if the Court should think either of the objections to the deed well-founded.

Palmer now moved accordingly.—First, the general words of the deed of the 16th of June, 1843, were not sufficient to pass the legal interest in the mortgage deed. *Ringer v. Cann* (a) will be referred to as an authority to the contrary; but there it was expressly found as a fact that the trustees under the assignment had accepted the lease. [*Parke, B.*—There was ample evidence to go to the jury in this case of the trustees having taken to the property. *Pollock, C. B.*—Is there any authority opposed to that of *Ringer v. Cann*?] Undoubtedly not. [*Pollock, C. B.*—Then it is a very strong authority against you.]

Secondly, the deed was avoided by the addition of the schedule after the execution of the deed by the plaintiff, and by the erasures in it. [*Parke, B.*—The fact that there is no schedule to regulate the trust does not prevent the property from passing, unless the schedule be expected to shew *what* passed by the deed.] In *Weeks v. Maillardet* (b), a deed was held to be avoided, as against the defendant, by proof that a schedule, stated in the deed to be annexed to it, was not in fact annexed until after the execution of the deed by the defendant. [*Parke, B.*—There the schedule was material to shew what passed by the deed, because the covenant in the deed was only to deliver to the plaintiff certain articles “as per schedule annexed.”] Here the schedule is material to shew what debts were barred by the deed. In *Hudson v. Revett* (c), where the defendant executed a deed conveying his property to trustees, in trust to sell for the benefit of creditors, the particulars of whose demands

(a) 3 M. & W. 313.

(b) 14 East, 568.

(c) 5 Bing. 368; 2 M. & P. 663.

were stated therein, and a blank was left for one of the principal debts, the precise amount of which was not ascertained until after its execution by the defendant, when it was inserted in his presence and with his assent, it was held that by reason of such assent the deed was valid from that time, but the Court laid it down clearly that it was not a complete deed until then. [*Alderson*, B.—There the Court considered it to have been executed originally as an escrow, and not absolutely executed until the blank was filled up. Here, at the time when the deed was executed by the plaintiff, the property passed; what is there to revert it?]

PER CURIAM,

Rule refused.

1845.
WEST
B.
STEWART.

BARTLETT v. MARY DIMOND, Executrix of CHARLES
PALMER DIMOND, Deceased.

April 17.

ASSUMPSIT for money had and received by the defendant's testator to the use of the plaintiff. Plea, non assumpsit.

At the trial, before *Rolfe*, B., at the Middlesex Sittings after Trinity Term, 1844, it appeared that one Charles Palmer became the mortgagee of certain freehold, copyhold, and leasehold premises, the property of the plaintiff, under a deed dated the 5th December, 1827, which contained a covenant by the plaintiff to procure admissions and renewals

D. was appointed by deed, by the plaintiff, the mortgagor of an estate, and P., the mortgagee, to receive the rents of the estate; and by the terms of the deed he was, after allowing for taxes and repairs,

to hold all the remaining rents in trust for the purposes therein specified; viz. 1st, to pay taxes; 2ndly, the costs of collection; 3rdly, a commission; 4thly, premiums on a policy of insurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July in each year, of the accruing interest on the principal money secured, and to pay the *ultimate surplus*, if any, to the plaintiff; with a proviso, that, if, on the 6th January or 6th July, he should have rents and profits in hand, it should be lawful for him to retain the whole or part for the purpose of paying the premiums in that year on the policy of insurance. D. did not execute the deed. *Held*, that D. was not bound by the terms of this deed to pay the surplus *existing on each* 6th January and 6th July to the plaintiff, and therefore that, although he had a balance in his hands on either of those days after payment of the half-yearly interest, he was not liable (the trust still continuing) to be sued by the plaintiff for money had and received.

1845.
BARTLETT
v.
DIMOND.

from time to time; and a policy of assurance was thereby charged with payment of the sums which might be expended in fines and fees of admission and renewal. There were other parties who were second mortgagees of property included in the deed, and to whom the plaintiff had, as further security, assigned certain policies of assurance. With the concurrence of all parties, Charles Palmer Dimond, the defendant's testator, was, by a deed of even date with the mortgage to Charles Palmer, appointed receiver, agent, and attorney, with the usual powers to collect the rents of the mortgaged estates, upon trust to pay—first, the outgoings upon the property; secondly, the expense of collecting the rents; thirdly, the receiver's commission; fourthly, the premiums on the policies of assurance; fifthly, the surplus rents and profits, in payment, half-yearly, on the 6th January and 6th July, of the interest on the principal money; and lastly, to pay the ultimate surplus of the rents and profits, if any, to the plaintiff, his executors, administrators, or assigns, for his own absolute use and benefit. There was a proviso, that, if, on those days, the 6th January and 6th July, the receiver should have any of the rents and profits in hand, it should be lawful for him to retain the whole, or part thereof, for the purpose of paying the premiums, in that year, on the policies. There was also a covenant by the receiver, to perform the trusts of the deed. Dimond did not execute the deed, but acted under it, and received the rents until 12th January, 1843, when he died, leaving his wife, the defendant, his executrix. It appeared that, in the year 1839, there was a balance in the hands of Dimond of £400; and at the time of the testator's death, the balance, as appeared by the account rendered by the defendant, exceeded £1000. The learned Judge was of opinion that the plaintiff had no remedy at law, and directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for the balance admitted by the defendant.

In Michaelmas Term, *Martin* obtained a rule accordingly, citing *Roper v. Holland* (a). In Hilary Term (January 23)

1845.
HARTLETT
v.
DIMOND.

Jervis and *Montague Smith* shewed cause.—The nonsuit was right. The question in this case presents itself in several forms:—first, whether Dimond, the testator, could have been sued by the plaintiff alone; secondly, whether there was an *ultimate surplus* in the hands of the testator; and lastly, whether money had and received will lie. [*Parke*, B.—The plaintiff, in order to recover, must shew that there was a positive surplus; that is the main question.] There must be a positive admitted surplus, which is not the case here. There was no final ascertainment that any money was due or payable to the plaintiff. The agreement of the testator was to perform the trusts of the deed; and the construction contended for on the other side, that he was bound to balance his accounts half-yearly, and from time to time to pay over the surplus then in his hands, would be inconsistent with the objects and provisions of the deed. It might, and probably would, be the duty of the receiver acting under this deed, to keep in his hands an amount sufficient to pay the taxes, and the premiums on the policies of insurance, in the event of any anticipated deficiency in the rents of the ensuing half year; and whether, in refusing to pay over any money in his hands at any of the half yearly periods, he would be acting correctly, and in conformity with the trusts, would be a matter for the consideration of a court of equity. Suppose he were suddenly called upon to pay fees of admission or renewal (which he is bound to procure, and would be guilty of a breach of trust if he did not), he would have no power to do so, if he is to ascertain and pay over the balance half yearly. Therefore, inasmuch as the nature of the trusts prevented there

(a) 3 Ad. & E. 899; 4 Nev. & M. 668.

1845.
 BARTLETT
 v.
 DIMOND.

being any final ascertainment that any sum was due to the plaintiff, there was no such appropriation to him as the law requires, in order to sustain the action for money had and received. There is no instance in which that action has been held to be maintainable in such a case. In *Case v. Roberts* (a), it was held, that money had and received lay where money was paid into the hands of a trustee for a specific purpose, which was satisfied, and a balance remained. But here the trust was not closed, and no clear or liquidated sum remained in the testator's hands. In *Roper v. Holland*, there was an admission by the trustee of a balance in his hands belonging to the cestui que trust; and the language of the Court in that case shews that the action would not have been maintainable had there not been an account stated. *Edwards v. Bate* (b) is an authority for the defendant. There a debt was assigned upon trust to pay certain sums, and to pay the surplus, if any, to the plaintiff; and money having been received by the assignee, it was held that, as the trust was still open, money had and received could not be maintained.

Martin and Greenwood, in support of the rule.—The plaintiff, under the terms of this deed, had the sole right to the surplus which existed, after satisfying the interest, on the 6th of January and 6th of July respectively, which, therefore, was money received to his sole use. He might solely have maintained covenant against the testator, if he had executed the deed; *Sorsbie v. Park* (c), *Servante v. James* (d); and he may now, therefore, maintain money had and received against the executor. The rule of law is, that, however complicated the facts of a simple contract, if it results from them that A. has received money which is payable to B., B. may maintain money had and received

(a) Holt, 500.

(c) 12 M. & W. 146.

(b) 13 Law J. (N. S.), C. P.
 156.

(d) 10 B. & C. 410; 5 Man. &
 Ry. 299.

1845.
BARTLETT
v.
DIMOND.

precedes it, as to the application of the surplus existing on the 6th January and 6th July. [*Parke, B.*—Not necessarily so; it may be a proviso upon all the preceding clauses.] When it immediately succeeds a matter to which it has a natural application, and there is no strong reason for construing it otherwise, it should be limited to the matter with which it is thus naturally connected. If such be not the construction, the plaintiff will not be entitled to receive anything until the trust is ultimately wound up, or, at all events, until the parties can be sure that there is no fear of a call upon the fund for any other purpose.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued last term, and time taken for consideration. The question is, whether an action will lie against the defendant as executor, for money had and received by his testator. The testator was appointed by deed, by the plaintiff, a mortgagor, and Palmer, the mortgagee, to receive the rents of the mortgaged estate, and by the terms of the deed the testator was, after allowing for the taxes and repairs to the tenants, to hold all the remaining rents in trust for the purposes in the deed specified. The purposes are—first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of assurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July, of the accruing interest on the principal money secured, and to pay the *ultimate surplus*, if any, to the plaintiff; with a proviso, that, if, on those days, the 6th January and 6th July, the testator should have rents and profits in hand, it should be lawful for him to retain the whole, or part, for the purpose of paying the premiums in that year on the policy; with other provisos. The deed contained a covenant by the testator with Palmer and with

1845.
 ┌
 BARTLETT
 v.
 DIMOND.

time to pay the half year's interest due in January; and if so, he might, without contravening the deed, keep the then surplus towards the subsequent interest. Whether he did so properly or not, could not be tried by a court of law: the only remedy would be in a court of equity, which could make proper inquiries, and give proper directions. So long as a trust continues, a bill in equity is the only remedy. We think that the monies received were originally received in trust; and that the trust had not determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him. This is the principle upon which *Roper v. Holland* (a), and other cases (b) referred to in the judgment of this Court in the case of *Pardoe v. Price* (c), was decided. The case of *Allen v. Impett* (d) seems at least questionable.

There is no evidence, however, of any such statement of account. If the account rendered by the executor had been rendered by the testator, it would have been a question for the jury whether it was such a statement as to constitute the testator a debtor; but being stated by the executor as the account of the testator, it is only equivalent to evidence that such payments as therein mentioned were made by and to the testator. We therefore think the rule must be discharged.

Rule discharged.

(a) 3 Ad. & Ell. 99; 4 Nev. & Ad. & Ell. 666.

M. 668.

(c) 13 M. & W. 282.

(b) See *Remon v. Hayward*, 2

(d) 8 Taunt. 263.

1845.
WATSON
v.
BODELL.

the warrant; but the seal of the commissioner was not affixed to this memorandum. The defendant refused to permit the plaintiff to depart until these costs were taxed and paid, and detained him for that purpose for an hour and a half; and on payment of the amount found due on taxation, viz. 8*l.* 10*s.* (which was done under protest), permitted him to depart.

The learned Judge thought this detention of the plaintiff, till payment of the costs, was illegal, and the jury found a verdict for the sum paid, and 40*s.* damages; but the learned Judge gave the defendant leave to move to enter a verdict for him.

Humfrey, in Michaelmas Term last, obtained a rule accordingly; against which

Whitehurst and *Mellor* shewed cause at the sittings after Hilary Term (Feb. 20 and 21). The commissioner had no authority to make an order for the plaintiff's detention until the costs were paid. It will be contended on the other side, that he was authorized to make this order under the 34th section of the 6 Geo. 4, c. 16, or the 69th section of the 5 & 6 Vict. c. 122; but no such power is really given by those statutes. By the 6 Geo. 4, c. 16, s. 33, it is enacted, "that it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, &c.; and if such person so summoned as aforesaid shall not come before the commissioners at the time appointed, having no lawful impediment, &c., it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the person or persons therein named for that purpose, to apprehend and

1845.
 WATSON
 v.
 BODELL.

son, and what not. Even in the case of one of the superior courts, as the Court of Common Pleas, for instance, if that Court were to issue a *capias* to the sheriff to take a man for felony, it would be entirely without jurisdiction; but if they issued a *capias* to take a peer, who is privileged, for a debt, the officer would be justified, because the Court has authority to issue a *capias* for a debt. And commissioners of bankrupt have no power whatever to commit or imprison, except in the cases expressly provided for by the bankrupt acts; and none of them give power to commit for non-payment of fees ordered to be paid. The stat. 5 & 6 Vict. c. 122, s. 69, which may be referred to, has no real bearing on the present question. It enacts, "that it shall be lawful for the said several subdivision courts, and the Court authorized to act in the prosecution of any fiat in bankruptcy, in all matters before such courts respectively; to award such costs as to such courts shall seem fit and just; and in all cases in which costs shall be so awarded against any person by any such court, it shall and may be lawful for such court to cause such costs to be recovered from such person, in the same manner as costs awarded by a rule of any of the superior courts at Westminster may be recovered, and that the like remedies may be had upon an order of such court for costs as upon a rule of any of the said superior courts for costs." That cannot have any reference to the present subject-matter. There is an express provision as to the costs of parties summoned to give evidence before the commissioners, in the 35th section of 6 Geo. 4, c. 16, which provides that, "where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the said commissioners, every such person shall have such costs and charges as the said commissioners, in their discretion, shall think fit." So that he is not to pay costs, but is to be paid costs for his attendance; though it is not neces-

1845.
 {
 WATSON
 v.
 BODELL.

authorize him, and the court issuing it had general cognisance of the matter: *Moravia v. Sloper* (a).] But here there was no order for the plaintiff's detention, nor any intention to commit for contempt.

The Court then called upon

Humfrey, Wing, and Macaulay, in support of the rule.— If the present action is held to be maintainable, it will amount to this, that the defendant is liable, because he has obeyed the order of the Court of which he is the inferior officer. The giving him a warrant, indorsed "to be discharged on payment of costs," is in effect an order to detain the party till the costs are paid. The commissioner indorses on the warrant the condition—"discharged on payment of the costs." [*Parke, B.*—The question is, whether that means "keep him in custody until he does pay." *Alderson, B.*—Suppose the commissioner had merely walked out of court, would the officer have been justified in detaining him?] No, he would not. [*Alderson, B.*—Then he was discharged from the warrant without the commissioner saying anything.] But when the commissioner writes this memorandum upon the warrant, can any one doubt that his intention was that the plaintiff should be detained until he had paid the costs; and is the officer to be driven to discuss the propriety of the order of the commissioner? No doubt the intention was to detain him until he paid the costs. It is a condition precedent to his discharge. [*Parke, B.*—In point of law he was not then in lawful custody, as the warrant had expired.] The commissioner had power, under the 69th section of 5 & 6 Vict. c. 122, to order him to pay costs, and to be detained until they were paid. That section enacts, that, "in all cases in which costs shall be so awarded against any person by any such

(a) *Willes*, 30.

1845.
 {
 WATSON
 v.
 BODELL.

until another case is called on. [*Alderson*, B.—Is not the word “discharged” sufficient to shew that the examination was over?] No; that order was coupled with a condition. The commissioner says, if he will pay the costs he is to be discharged. That was clearly a conditional order, and the plaintiff should have applied to the commissioner to discharge him: *Smith v. Egginton* (a). And in *Blessley v. Sloman* (b) it was held, that, if the plaintiff was detained no longer than the defendant, the officer, was justified in detaining him under a lawful warrant, the latter was not liable. Here the defendant was not bound to discharge the plaintiff until the commissioner ordered him to be discharged; and the order which was given for his discharge being conditional, he was not at liberty to discharge him until that condition was complied with.

But further, the commissioner had a general jurisdiction under the bankrupt acts to make an order for the payment of costs in all proceedings before him; and although that power, perhaps, was not correctly enforced in the present case, yet, if he had the jurisdiction, the officer is protected. The commissioner having a general jurisdiction over the subject-matter, although he exceeded his authority, the officer is excused: *Ackerley v. Parkinson* (c); Bacon's Abr. “Trespass,” (D. 3); *The Marshalsea case* (d); Dalton, 105; *Morse v. James* (e); *Moravia v. Sloper* (f). There are various cases in which this matter has been discussed, but there is no case in which the officer has been held liable, where the Court had a general jurisdiction over the subject-matter: Vin. Abr., “Trespass,” C. (a. 2), and F. (a. 2); *Weller v. Toke* (g). The question is not whether the commissioner was strictly justified, but whether he had any authority to act *at all* in the matter. Now here he clearly had power over the costs,

(a) 7 Ad. & Ell. 167; 2 Nev. & P. 143.

(b) 3 M. & W. 40.

(c) 3 M. & Selw. 411.

(d) 10 Rep. 76.

(e) Willes, 122.

(f) Id. 30.

(g) 9 East, 364.

1845.
 {
 WATSON
 v.
 BODELL.

if he had, he could not secure the payment of them by such an order as this. He had no more right to order that a man should be imprisoned until payment of costs not yet due, than that he should be hanged or tortured until such payment. Then the officer must take notice, at his peril, of the extent of the authority of the commissioner, and of the validity of his order. He is bound only to obey all *lawful* orders. Could a verbal order by one of the Judges of the superior courts to a sheriff, to take the goods of a suitor in execution, and levy costs thereout, operate as any justification to the sheriff? There are many authorities to shew that such is the principle applicable to officers acting under the orders of an inferior jurisdiction: *Carratt v. Morley* (a), *Painter v. Liverpool Gas Company* (b), *Webb v. Bachelour* (c), *Moravia v. Sloper* (d), *Morse v. James* (e), *Morrell v. Martin* (f). In what terms could the defendant have stated this supposed defence on the record? Would it have been sufficient merely to shew the fiat depending, and the order of the commissioner? or must he not have shewn that the court had jurisdiction over the particular subject-matter? Surely he must, unless the distinction established between superior and inferior courts in this respect is to be altogether disregarded. *The Marshalsea Case*, and others in which the officer has been held to be protected where he acts under a good warrant, are no authorities for the present defendant.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, in which the plaintiff had recovered a verdict for ten guineas, in an action of trespass and false imprisonment, a rule nisi for a new trial was

- | | |
|-------------------------------------|----------------------|
| (a) 1 Q. B. 27 ; 1 G. & D. 275. | (d) 1 Stra, 509. |
| (b) 3 Ad. & E. 433 ; 6 N. & M. 736. | (e) Willes, 122. |
| (c) 1 Vent. 273. | (f) 3 Man. & G. 581. |

1845.
WATSON
v.
BODELL.

for a reasonable time whilst the warrant is in preparation. It is unnecessary, in this case, to decide what is the precise time at which the authority of the original warrant ceased, as there is no doubt that it had ceased before the imprisonment terminated. But several questions remain to be decided.

First, it is said that there was no order of the commissioner to detain *until* the costs should be taxed and paid; secondly, if there was, that the commissioner was not justified in making such an order, and would have himself been liable to an action of trespass, and that the officer, knowing of the want of authority, was equally liable; and, thirdly, supposing that the commissioner was protected, that the officer was not, because he had not a legal authority from the commissioner.

The first of these questions arises upon the form of words used by the commissioner in the written order. He directed the plaintiff to be discharged *on payment of costs*, and we think that this order imports that he was not to be discharged until the costs should be taxed and paid.

That the commissioner had no power to make such an order, and that the plaintiff would, consequently, have been discharged from custody on a return to a habeas corpus, stating the fact correctly, appears to us to be clear. But whether the commissioner would have been liable, at the suit of the plaintiff, to an action of trespass, is a different question. The stat. 5 & 6 Vict. c. 122, s. 66, gives the Court of Bankruptcy (which the commissioner constitutes) all the powers, rights, privileges, and incidents of a court of record; consequently, the jurisdiction of the commissioners to commit for a contempt admits of no doubt. But it was conceded that the order to detain was not a commitment of this nature, and could not be protected on this ground. It was argued, however, that it was an act done by a court of record, having jurisdiction over the person of the plaintiff, and the subject-matter, which, though

wrongly done, did not make the judge liable to an action of trespass; on the principle laid down by Lord *Holt*, in the case of *Hamond v. Howell* (a), arising out of *Bushell's case*, Vaughan, 135, in *Ackerley v. Parkinson* (b), and by the Court of Common Pleas in Ireland, in the case of *Taaffe v. Downes*, reported in 3 Moore's Privy Council Cases, 36, and several other cases. We think, however, that the order in question is not within the scope of the special jurisdiction given to the commissioner by the statutes of bankruptcy; and as he has not a common-law jurisdiction, he has no other power than that which the statute gives, or which is a necessary incident to that power. If this had been a commitment for a contempt, however improper, doubtless the commissioner would have been punishable by action of trespass, because he has a general power to commit for a contempt. So, though the costs might be improperly given to one party, there would be no redress by action of trespass, for levying them in the proper mode, because the commissioner has a power to give costs by 5 & 6 Vict. c. 122, s. 69; and the determination of the question, whether costs should be paid, is within his jurisdiction. So, if the statute had given a general power to levy costs, in the manner in which the Court should think fit, or a general power simply, no question could have been raised by action of trespass, as to the legality of an order of immediate imprisonment until the costs were ascertained and paid; but there is no such general power given by the statute in the case of commissioners of bankrupt. The power to award costs is given generally to the Court by the 69th section: the mode of compelling the payment is, by the same section, not given *generally*, but it is provided, "that, in *all cases* in which costs shall be awarded against any person by such Court, it shall be lawful for such Court to cause such costs to be recovered in

1845.
 WATSON
 v.
 BODELL.

(a) 1 Mod. 184.

(b) 3 M. & Sel. 411.

1845.
 WATSON
 v.
 BODELL.

the same manner as costs awarded by rule of any of the superior courts at Westminster may be recovered, and the like remedies may be had upon an order of such Court for costs, as upon a rule of any of the said superior courts for costs." As neither the power to award costs, nor the office of a commissioner of bankrupt, is known to the common law, but both depend on the statute law, and no other power over costs is given by statute than the one referred to, that authority must be pursued; and consequently we think that the commissioner had no other power to enforce the payment of costs than that which was so given, and in the mode so prescribed, and therefore that the order in question *was without jurisdiction*, and void; and, if so, the defendant, who must be assumed to have known the law, knew the invalidity of the order, and could not be protected by it.

We do not, therefore, consider it necessary to decide the point, whether, supposing that the commissioner was not liable to an action of trespass for the imprisonment by virtue of his order, the officer, under the circumstances of this case, was liable, on the ground that he had not the proper authority from the Court to imprison the plaintiff. It is certain, that a warrant under the hand and seal of the commissioner is the proper course to be pursued for the refusal to be sworn or to answer, &c., under the 34th section of 6 Geo. 4, c. 16; and if a warrant were required in this case, the 5 & 6 Vict. c. 122, s. 79, requires it to be under the hand and seal of the commissioner. On the other hand, it is clear that a court of record may commit by order to the custody of its officer in open court, as the Queen's Bench or Quarter Sessions, for there is, or ought to be, a record of such commitment (a); and the order given *sedente curiâ* by the Court in this case would probably be a protection to the officer.

(a) 2 Hale, P. C. 122 and see *In re Clarke*, 2 Q. B. 619.

But, for the reason before given, that the commissioner had no jurisdiction to secure the payment of costs *in this way*, and that the officer, who knew of the excess of jurisdiction, is not protected, we are of opinion that the rule must be discharged.

1845.
WATSON
v.
BODELL.

Rule discharged.

GOSLIN v. COTTERELL (a).

April 29.

THIS was an action of debt, in which a sum exceeding £20 was indorsed on the writ of summons, but the plaintiff, by his particulars of demand, claimed 17l. 6s. only. A writ of trial having been directed,

A writ of trial cannot issue under 3 & 4 Will. 4, c. 42, s. 17, where the sum indorsed on the writ exceeds £20, although a sum less than £20 is claimed by the particulars. And the Court will not amend the writ, by reducing the sum indorsed to the amount mentioned in the particulars, but will set aside the writ.

Pearson now moved to set it aside. The learned Judge had no jurisdiction under the 3 & 4 Will. 4, c. 42, s. 17, to order the writ of trial to issue in this case. That statute gives the authority only "in any action for any debt or demand, in which the sum sought to be recovered *and* indorsed on the writ of summons shall not exceed £20." It is therefore clearly not sufficient to bring the case within the statute, that the amount really sought to be recovered is under £20.

Arnould shewed cause in the first instance, and admitted that, as the writ stood, the case was not one which ought to be tried before the sheriff; but he asked to have the writ amended, by reducing the sum indorsed thereon to 17l. 6s., the amount claimed in the particulars, and cited *Frodsham v. Round* (b).

ALDERSON, B.—The Judges have agreed that they will

(a) Decided by *Alderson*, B., sitting alone.

(b) 4 Dowl. P. C. 569.

1845.
 {
 GOSLIN
 v.
 COTTERELL.

not allow the writ to be amended. If a plaintiff chooses to indorse the writ for a larger amount than is really due, he ought not to be allowed afterwards to change his mind and alter the indorsement. The rule must be absolute to set aside the writ of trial.

Rule absolute.

Feb. 15 and
 May 23.

MILLS v. GOFF.

A notice to quit a house held by the plaintiff as tenant from year to year, was given to him on the 17th June, 1840, which required him to quit the premises "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." The tenancy had commenced on the 11th October in a former year:—*Held*, that this was not a good notice for the year ending on the 11th October 1841.

TRESPASS for breaking and entering the dwelling-house and premises of the plaintiff, and expelling him from the possession thereof. Plea, justifying the trespasses under the Small Tenements Act, 1 & 2 Vict. c. 74. The plea alleged, that the plaintiff was tenant of the premises from year to year, at a rent not exceeding £20; and that "afterwards, and before the said time when &c., to wit, on the 11th October, 1841, all the term and interest of the plaintiff of and in the same premises ended and became duly determined by a legal notice to quit the same." The replication traversed this allegation in its terms, and issue was joined thereon. At the trial, before *Williams, J.*, at the Summer Assizes for Suffolk, 1844, the defendant put in evidence a notice, dated and served upon the plaintiff on the 17th June, 1840, requiring him to quit the premises in question "on the 11th October now next ensuing, or such other day or time as your said tenancy may expire on." It appeared that the tenancy had commenced on the 11th of October in a previous year. It was objected, for the defendant, that this notice, which clearly was insufficient for the 11th of the month of October next ensuing its date, was bad also as a notice to quit in any subsequent year, and that the issue ought therefore to be found for the plaintiff. The learned judge thought that it was a good notice to quit in October 1841, and the jury accordingly, under his direction, found for the

1845.

MILLS

v.

GOFF.

than a legal notice.—He cited also *Leech v. Bailey* (a).
In this term, (May 3),

Prendergast (*Palmer* with him) was heard in support of the rule.—The notice is bad. It was plainly intended as a three months' notice, and there cannot, therefore, be any inference in favour of the intention of the party to give a legal six months' notice. It is obvious, that the words "or such other day or time as your tenancy may expire on" are not added with reference to a future year, but merely because the landlord is not quite certain of the actual day on which the tenancy commenced, whether it was the 10th, 11th, or 12th October. [He was then stopped by the Court.]

POLLOCK, C. B.—The single question is, whether this is a good notice to quit for Michaelmas, old or new, in the year 1841. I think it is not. The notice was served in June 1840, and required the plaintiff to quit on the 11th October then next ensuing, or such other day or time as his tenancy might expire on. The natural meaning of such a notice, and that which every person reading it would understand it to convey, is this: "You are to quit my premises on the 11th October next; but, as I am not certain whether that is the proper day or not, I do not confine myself to that particular day, but add the words 'or such other day or time as your tenancy may expire on.'" If a three months' notice had been sufficient, this notice would have been good. It is argued for the defendant, that the notice is meant to embrace the *double* alternative, of that not being the very day, or that year not being the very year. I think nothing in the notice sufficiently appears to point to that conclusion, and that the tenant, when reading it, could not so construe it, but might more

1845.

April 23. The CALDER and HEBBLE NAVIGATION COMPANY v.
PILLING and Others.

By a local act, 6 Geo. 4, c. lxxi, the company of proprietors of a public navigation were empowered to make bye-laws for the good government of the company, and for the good and orderly using the navigation, and also for the well-governing of the bargemen, watermen, and boatmen, who should carry any goods, wares, or merchandise upon any part of the said navigation, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the major part of the company should seem meet, not exceeding £5.—The company made a bye-law that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time, (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor should any boat, &c. pass along any part of the said navigation on any Sunday, except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to, or returning from, any place of divine worship, under a penalty of £5:—*Held*, that the act did not authorize the company to make the above bye-law, and that it was illegal and void.

TRESPASS for breaking and entering a close of the plaintiffs, being part of a certain canal called the Calder and Hebble Navigation, in the county of York, and then forcing and breaking a chain of the plaintiffs, then fastened across the said canal.

Plea, that, before and at the said time when &c., the said close was part of a public or common canal or navigation, that is to say, the Calder and Hebble Navigation, navigable for boats, barges, lighters, and other vessels, under certain acts of Parliament, to wit, the 9 Geo. 4, c. lxxi, [and others, setting out the titles]; and because the said chain, at the said time when &c., had been and was unlawfully and wrongfully placed, suspended, and fastened across the said canal, and obstructing the same, and the navigation thereof, at the said close in which &c., so that without removing the said obstruction, the liege subjects of our lady the Queen then could not navigate or pass upon and along the canal at the said close, &c., with their barges, &c., carrying therein goods, &c., as under and by virtue of the said statutes they otherwise ought to have done, and would have done; and because one John Wood, then being a liege subject of our lady the Queen, having, at the said time when &c., occasion to navigate on the said canal, at the said close, &c., with certain boats and other vessels of him the said John Wood, fit and proper &c., and not exceeding &c., for the purpose of carrying therein divers goods, wares, and merchandise, then loaded and being in and upon the said boats, &c., and being then so obstructed as

1845.
 CALDER
 AND HEBBLE
 NAVIGATION
 COMPANY
 v.
 PILLING.

using the said navigation, and all warehouses, wharfs, and passages, locks, and other things that are or shall be made for the same, and of and concerning all such vessels, goods, and merchandise as shall be navigating and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, or merchandise, upon any part of the said navigation, (that is to say); that the said navigation, and all such warehouses, &c., be closed on every Sunday throughout the year, that is to say, from twelve o'clock each Saturday night until twelve o'clock each Sunday night, and that no business shall be transacted thereon or thereat during such time, (works of necessity only excepted), nor shall any person during such time navigate any boat, barge, or other vessel, whether empty or laden with any goods, wares, or merchandise, nor shall any such boat, barge, or other vessel be allowed to pass along any part of the said navigation on any Sunday, on any pretence whatever, after twelve o'clock on each Saturday night, except for such distance, not exceeding 500 yards, as may be reasonable and necessary for the safe mooring of such boat, &c., and except it be on some extraordinary necessity, or for the purpose of going to or returning from any place of divine worship; and if any bargeman, waterman, or boatman, or other person having the charge of any boat, barge, or other vessel navigating on any part of the said navigation, or any person employed on the said navigation, or at any of the warehouses, wharfs, passages, locks, and other things that are or shall be made for the same, belonging to the said company, shall offend in any of the premises, he, she, or they shall forfeit and pay for every such offence the sum of £5, to be recovered and employed as directed by the said acts." Of which said bye-law and constitution the said John Wood and the defendants afterwards, and before the said time when &c., viz. on the same day &c., year &c., had notice—

1845.
CALDER
AND HEBBLE
NAVIGATION
COMPANY
v.
PILLING.

shew, with sufficient certainty, how the bye-law was made in pursuance of the alleged acts of Parliament, and that it did not disclose a valid bye-law, or such as rendered the defendants trespassers.

The plaintiffs' point was, that the bye-law was good and valid.

Cowling, in support of the demurrer.—The question in this case is, whether this bye-law, made under the power given by the 37th section of the act 9 Geo. 3, c. lxxi, (local and personal), is valid or not. The defendants contend that it is bad, for several reasons. By that section it is enacted, "that the company of proprietors, their successors and assigns for the time being, shall have power and authority, at any general meeting to be held &c., to make such new rules, bye-laws, and constitutions for the good government of the company, and for the good and orderly using the said navigation, and all warehouses, wharfs, passages, locks, and other things that shall be made for the same, and all such vessels, goods, and commodities, as shall be navigated and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, or merchandise upon any part of the said navigation, and from time to time to alter or repeal the said bye-laws and constitutions, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same as to the major part of the said general meeting shall seem meet, not exceeding the sum of £5 for any one offence," &c. And the 50th section makes it a public navigation, and gives the public liberty to use the navigation, subject to the bye-laws. The power of making bye-laws is an extraordinary one, and such a power ought to be construed strictly. First, this bye-law is in restraint of trade, and it is laid down as a principle that all bye-laws in restraint of trade must be reasonable and bene-

1845.
 CALDER
 AND HEBBLE
 NAVIGATION
 COMPANY
 v.
 PILLING.

Ellenborough, C. J., says, "A bye-law giving a remedy by distress for the recovery of the penalty would be bad. . . . It is true, undoubtedly, that if the law give the power of inflicting a penalty, where it gives the end, it also gives the common means of attaining it by action, but it does not give any extraordinary means." And *Le Blanc*, J., says, "If the usage only authorizes the inflictions of a penalty, and stops there, I am not aware of any case which shews that a bye-law may go farther than the common-law mode of recovering it by action." So, in *Com. Dig.*, tit. "Bye-law," (E. 1), it is said, "A bye-law, that a party, unless he obeys, shall be imprisoned, is void, being contrary to *Magna Charta*." And, again, in (E. 2), "A bye-law that a party, unless he pay, shall forfeit his goods, is void." [*Pollock*, C. B.—Put this on the footing of a public road,—a canal is a public highway,—what right have they to put a chain across it? *Alderson*, B.—The extent of the general law is limited by the penalty, and, if so, so must this private act.] This bye-law is altogether bad. In section 44 power is given the company to collect tolls, but of a limited amount; but, if the company are allowed to impose a penalty for travelling on a Sunday, they might thereby increase the tolls to any extent: but it was never intended they should have such a power. There is no case in which the same language has appeared in any act of Parliament, but there is one case of a charter, where the language was very like the present, and there the bye-law was held bad, as being in restraint of trade:—the case of *The Tailors of Ipswich* (a). Here it is not shewn that there was any necessity or convenience for the benefit of the canal, or the persons using it, that this bye-law should be made, and the canal has existed since the passing of the act in the 9 Geo. 3, without such a bye-law. *Dodwell v. The University of Oxford* (b) shews that, unless there is some reason for the restraint, the bye-

(a) 11 Rep. 53, 54 a.

(b) 2 Ventr. 33, 34.

1845.

CALDER
 AND HEBBLE
 NAVIGATION
 COMPANY
 v.
 PILLING.

every respect pursuant to the act. It professes to be made for "the good governing of the company, and for the good and orderly using of the navigation." The putting the chain across has nothing to do with the bye-law itself; but it is averred in the replication, that the chain was placed there for the purpose of enforcing obedience to the bye-law, and for the good and orderly using of the navigation; and it is averred that the suspension and affixing of the chain was reasonable and necessary for that purpose, and that is admitted by the demurrer. [*Pollock*, C. B.—The defendant, by demurring to the replication, does not admit that. If it be a mere question of fact, then it is conceded that the fact is admitted; but if in point of law it be not justifiable, it is not admitted. *Alderson*, B.—If a bye-law to prohibit navigation on the canal on Sunday be justifiable, then you had a right to put up the chain.] The sole question, therefore, is, whether the bye-law is a good and reasonable one or not. It is framed under an act which gives the company power to make bye-laws "for the good and orderly using" of the navigation in general; and the closing it upon Sundays, except for works of necessity and the purpose of attending divine service, is a reasonable restriction, tending to the good and orderly use of the navigation in general, as much as the closing it during particular hours would be in order to render it more serviceable at other times. But it has been said, that, if the company can make a bye-law to prevent navigation on a Sunday, why not, on the same principle, might they not do so on other days? Why, because Sunday is a day on which, by various acts, carrying on trade is prohibited, for the purpose of preserving the sanctity of the Sabbath. Thus, in 3 & 4 Will. 4, c. 31, s. 1, it is recited, that it is the duty of the Legislature to remove as much as possible impediments to the due observance of the Lord's-day. That is a legislative declaration that Sunday ought to be duly

observed. So, the 29 Car. 2, c. 7, s. 2, which has been before referred to, prohibits all travelling in boats or barges on Sundays, and it makes no distinction whether they are used on canals or anywhere else. And that statute is still in force. It has been said it has been repealed by the Thames Act, 7 & 8 Geo. 4, c. lxxv; but that act was passed for purposes purely local, and the general words of the first section are qualified by subsequent sections, which shew that the Legislature only intended to repeal the 29 Car. 2, c. 7, as to those limits within which the Thames Act was to be in force. [*Pollock*, C. B.—It is rather an anomaly to find the general repeal of a public act contained in a private one.] We may assume that, if the objects of the act are local, it is not intended to have a general repealing effect. The 3rd section of the act says that that act and the several provisions thereof shall extend to certain defined limits, while the provisions of the 40th and 41st sections expressly contain the words *within the limits of this act*. And it is a known rule of construction, that general words of repeal may be qualified by words shewing that only a partial repeal was intended: *Camden v. Anderson* (a); *Rex v. Rogers* (b). Then, if the stat. 29 Car. 2, c. 7, s. 2, be not repealed, it is still penal to travel in barges on Sunday, and if so, it would be impossible to call a bye-law unreasonable, which is in exact accordance with the spirit of a public statute. But it is said that that statute does not apply to this case, because canals were not then known; but there is no allegation here that there were not then any, and it must not be assumed. The clause is general, that no person shall “travel on the Lord’s-day with any boat, wherry, lighter, or barge:” it does not confine the prohibition to rivers only. This bye-law was drawn, in some respects, with reference to that clause in the stat. 29 Car. 2, c. 7. It is at the peril of the company that

1845.
 CALDER
 AND HEBBLE
 NAVIGATION
 COMPANY
 v.
 FILLING.

(a) 6 T. R. 723.

(b) 10 East, 569.

1845.
 CALDER
 AND HESSELM
 NAVIGATION
 COMPANY
 v.
 PILLING.

they exercise a proper discretion; no doubt they have here done so. [*Pollock*, C. B.—Suppose the 29 Car. 2, c. 7, to be still in force, the using a boat on Sunday is prohibited under a penalty of 5*s*. How can it be said that £5 is a reasonable sum, when the general statute says 5*s*. is enough? it is twenty times the amount.] The plaintiffs have a right to use the Thames Act so far as to shew that there is a penalty of £5 given by it, which shews that the penalty imposed by the stat. 29 Car. 2, c. 7, is not to govern the case, and that the former is a reasonable penalty in the contemplation of the Legislature. By the 37th section of this act, 9 Geo. 3, c. lxxi, the company are empowered to make such new rules, bye-laws, and constitutions for the good of the company, and for the good and orderly using the navigation, and to impose such reasonable fines upon all persons offending against the same, as to the major part of the general meeting should seem meet, not exceeding the sum of £5. [*Alderson*, B.—This is for not using it. An “orderly using” of it must be when the person uses it.] A good and orderly use of the navigation may mean the not using it on a Sunday. It is also “for the well governing of the bargemen, &c., who shall carry goods, wares, or merchandise upon any part of the said navigation.” Surely that may apply to the well governing them in their general conduct. [*Alderson*, B.—The well governing the bargemen, &c. must mean *in the carriage of goods* upon the navigation. The act means to provide for the management of the canal; why not leave the management of other matters to the higher law? Would the corporation of London be justified in putting a chain across the Thames to prevent steamers going up it on a Sunday?] The case does not turn on the question, whether the putting up of a chain was a reasonable mode of enforcing the bye-law. It has been asked, was it ever known that the trustees of a turnpike-road could put a chain across it? Why, every bar

1845.
 CALDER
 AND HERBLE
 NAVIGATION
 COMPANY
 v.
 PILLING.

and commodities as shall be navigated and conveyed thereon, and also for the well governing of the bargemen, watermen, and boatmen who shall carry any goods, wares, or merchandise upon any part of the said navigation." Now, looking at these words, it appears to me that all the power which the Legislature intended to give this company with respect to making laws for the government of this navigation, was solely for the orderly use of the navigation; that is to say, to regulate in what manner and order the navigation should be used, so as to secure to the public the greatest convenience in the use of it. The rules which they are empowered to make have nothing to do with the regulation of moral or religious conduct, which are left to the general law of the land, and to the laws of God. The rules of the company are to be solely for the purpose of convenience, and to advance the orderly use of the navigation; such, for instance, as that A. shall not go before B.; that vessels shall not pass during particular periods, and such like,—in order that the greatest number of barges and other vessels may, with the greatest convenience, be able to pass along the navigation. That, it appears to me, is the power conferred on the company relative to making rules "for the good and orderly using of the navigation." Then we come to the next clause, which empowers them also to make rules "concerning vessels, goods, and commodities which shall be navigated and conveyed thereon." Under this the company may, for aught I know, have power to regulate the shape of the vessels to be used on the navigation, so as to render it most convenient for the greatest number; as, for instance, that no boats shall be employed except such as are of a certain width or length, &c., all which are matters very fit and proper to be regulated by the company. So, again, they are empowered by this section to make bye-laws "for the well governing of the bargemen, watermen, and boatmen who

1845.
CALDER
AND HEBBLE
NAVIGATION
COMPANY
v.
PILLING.

right have the proprietors of a particular navigation to prevent that, and say, that "We, acting *pro salute animarum* of the Queen's subjects, will not allow them to do what the law allows." But suppose, on the other hand, that the argument of the plaintiffs' counsel is right, and that the stat. 29 Car. 2, c. 7, is still in force, then the Legislature by that act have said, that it is not decorous and proper to use barges on a Sunday, and whoever does so shall pay a penalty of 5*s.*; and if so, what right has a company to say there shall be a cumulative penalty, and the offender shall forfeit £5? It is perfectly clear, as pointed out by my Brother *Alderson*, that the company have done something quite beyond the power which the Legislature meant to repose in them. The Legislature says to the company, "You may make bye-laws for the good and orderly navigation of the canal, and for the government of the boatmen and bargemen connected with it;" that is to say, in order that the navigation may be used with the utmost degree of convenience to every one. Now, the only point that occurred to me was this: whether, on a state of facts properly alleged, a bye-law like this might not, under peculiar circumstances, be held good. Suppose, for instance, the company were to come to the conclusion that, in order to secure a due supply of water in the canal, it was necessary to have no navigation on it during one day out of seven, perhaps they would have power to close the canal for one day out of seven, in order to make the navigation good during the other six, and in that case to say, "If this must be done, we will take Sunday as the fittest day." But it is not contended that that was the object of the plaintiffs in this case; they only say that it was decorous that the canal should not be used on Sundays. That, I think, is a matter out of the cognisance of the company, and consequently that their bye-law founded on that principle is void.

1845.
 }
 DOE
d.
 LLOYD
v.
 INGLEBY.

for twenty-one years from the 25th March, 1839, at a rent of £25 a year, and the defendant entered into possession accordingly. In November, 1840, Evans committed an act of bankruptcy, upon which a fiat issued, under which, in February 1841, he was declared a bankrupt. The petitioning creditors were two partnership firms, Messrs. Rees, Guppy, & Co., whose debt was £99, and Messrs. Henderson & Cox, whose debt was £73. An ejectment was thereupon brought by the lessors of the plaintiff against Evans, (but which was not served on the defendant Ingleby); judgment was allowed to go by default, and on the 12th May, 1841, the lessors of the plaintiff executed their writ of possession, and re-entered upon all the premises except the rooms held by the defendant, of which he continued in possession. In February, 1843, an execution was levied against the defendant's goods, and thereupon the lessors of the plaintiff served the sheriff with notice that the sum of £25, "being a year's rent due in November last," was in arrear from the defendant to them, and requiring him to pay over the same. In pursuance of this notice, the sheriff paid over to them the sum of £25 out of the levy. On the 29th April, 1843, the defendant was served with notice to quit the premises at the end of his year's tenancy which should occur next after the expiration of six months from the service thereof.

It was contended on behalf of the defendant, first, that the lessee Evans was not duly declared a bankrupt within the meaning of the proviso for re-entry, for that the Bankrupt Act, 6 Geo. 4, c. 16, s. 15 (*a*), did not authorize the issuing of a fiat upon the joint petition of two partnership firms, each of whose debts was under £100; secondly, that the defendant's tenancy from year to year

(*a*) Which enacts, that no commission shall be issued "unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall

amount to 100*l.* or upwards; or unless the debt of *two creditors so petitioning* shall amount to 150*l.* or upwards," &c.

1845.
 {
 DOE
 d.
 LLOYD
 v.
 INGLEY.

actual entry, and which must have been before Easter Term, 1841; and in that case also the notice was good, and the demise properly laid.

Jervis, in support of the rule.—The terms of the notice, which speak of a year's rent being due in November before, are equally consistent with the tenancy having commenced on the 12th May, 1841. And it cannot be held to have commenced on any earlier day, for until that time the parties were mere trespassers, to whom a demise cannot be presumed.

Cur. adv. vult.

The judgment of the Court (a) was now pronounced by—

POLLOCK, C. B.—In this case, which was argued the other day, it appeared that a notice to quit was given to the defendant on the 29th April, 1843. The ejectment was brought on a demise laid on the 4th May, 1844. The question is, whether the defendant's tenancy began at such a time as to admit of that demise being resorted to. The point was reserved by my Brother *Coleridge*, who tried the cause, who reports to us that leave was given to move to enter a nonsuit or a verdict for the defendant, the Court to be at liberty to draw the proper conclusion of fact, in the same way as a jury. Upon the case as it appeared and was argued the other day, the conclusion we draw is, that the tenancy commenced on the 12th of May; therefore the demise, being on the 4th May, was too soon, the title of the lessors of the plaintiff not having accrued. The consequence is, that the action cannot be maintained, and the defendant is entitled to enter a verdict or a nonsuit.

Rule absolute to enter a verdict for the defendant.

(a) *Pollock*, C. B., *Rolfe*, B., and *Platt*, B.

1845.
GRACE
v.
INGALL.

The declaration contained also counts for money had and received, and on an account stated.

The defendant pleaded non assumpsit to the common counts, and also nine special pleas to the first count. The first five alleged respectively, that the said declaration and statement so made by the said John Scott were untrue, in this: that, at the time of making the same, to wit, on &c., he the said John Scott had had spitting of blood,—consumptive symptoms,—a certain affection of the lungs,—a certain affection of the liver,—and a cough, to wit, a cough of an inflammatory and dangerous nature. The sixth special plea alleged that the said John Scott, at the time of making the said declaration and statement, was afflicted with a disorder tending to shorten life; the seventh, that a certain thing alleged by the said John Scott in the said declaration, &c., was untrue, in this, that the said John Scott, at the time of his so making the said declaration, was not in good health; the eighth, that the said declaration was untrue, in this, that the said John Scott falsely averred therein that the said J. W. was, at the time of making the said declaration, his usual medical attendant; and the ninth alleged that the policy was made through the fraud, covin, and misrepresentation of the said John Scott. On all these pleas issues were joined.

On the trial of the cause, before Lord *Denman*, C. J., at the Summer Assizes for the county of Warwick, 1844, the defendant's counsel claimed the right to begin; but the Lord Chief Justice, after argument, ruled that the plaintiffs were entitled to begin, inasmuch as the onus of proving the issue on the seventh special plea (if not on others) lay on them. The plaintiffs' case having concluded, the defendant called witnesses, who proved that, about four years before the policy was effected, the assured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and it appeared that he died of consumption in the year 1843, at the age of thirty-

1845.
 GEACH
 v.
 INGALL.

whether the averment of the assured being in good health is a material averment, without which the plaintiffs could not succeed. Whether it be an *affirmative* or a *negative* averment is not the test; if there be a negative averment in the declaration, which is a material one, the plaintiff must give some general evidence of it. Surely this is a necessary averment. *Pollock*, C. B., referred to *Rawlins v. Desborough* (a).]

Secondly, with respect to the supposed misdirection, it was contended on the part of the plaintiff, on the trial, as it is now, that the question was not simply whether the assured had ever spat blood, but whether he had been afflicted with the disease called *spitting of blood*, or hæmatoptysis. Of that there was no evidence. The learned Judge, therefore, was right in stating to the jury, that, in order to vitiate the policy, it must be shewn that the spitting of blood to which the evidence referred must be such as had a tendency to shorten life. But, even supposing that this direction, per se, was not strictly correct, the jury could not have been misled thereby, as it was an observation made generally upon the issues raised by the record, and the Lord Chief Justice, in the beginning of his summing up, as also at the close of it, stated to them each of the issues in the very terms of it.

Humfrey and *Waddington*, in support of the rule, were stopped by the Court.

POLLOCK, C. B.—On the second point, I think it is clear that there must be a new trial. With respect to the question as to the right to begin, there can be no doubt, since the case of *Huckman v. Fernie*, that where it is clear that wrong has been done by the ruling of a judge at *Nisi Prius*, as to which party should begin, by the onus

(a) 8 C. & P. 325.

1845.
GEACH
v.
INGALL.

only on the seventh issue, but on all the issues upon the pleas denying the truth of the statement of the assured, set out in the declaration ; for the truth of that statement is a necessary averment in the declaration, and the several parts of it are denied by those pleas. It accordingly lay on the plaintiffs to prove that statement to be true, and if so, they were entitled to begin. The rule on this subject I have always considered to be, to see what would be the consequence if no evidence were given at all. If, in such case, the verdict ought to be given for one party, it is manifest that something must be done by the other party to prevent that consequence ; and he who has to give evidence to prevent the result being against him must begin. Then, as to the misdirection, my Lord *Denman* certainly does not appear to have sufficiently called the attention of the jury to the distinction between those disorders, respecting the existence of which, at the time of executing the policy, the assured was called on to make a specific declaration, and those which might have formerly existed. By "spitting of blood" must, no doubt, be understood, a spitting of blood as a symptom of disease tending to shorten life: the mere fact is nothing ; a man cannot have a tooth pulled out without spitting blood. But, on the other hand, if a person has an habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still, as this shews a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company, for no one can doubt that it would most materially assist them in deciding whether they should execute the policy ; and good faith ought to be kept with them. So, if he had had spitting of blood only once, but that once was the result of the disease called spitting of blood, he ought to state it, and his not doing so would probably avoid the policy. Again, suppose this man had an inflammation of the lungs, which had been cured by bleeding, many physicians would perhaps say, that it was an inflammation of the lungs of so

1845.
 GEACH
 v.
 INGALL.

The declaration contained also counts for money had and received, and on an account stated.

The defendant pleaded non assumpsit to the common counts, and also nine special pleas to the first count. The first five alleged respectively, that the said declaration and statement so made by the said John Scott were untrue, in this: that, at the time of making the same, to wit, on &c., he the said John Scott had had spitting of blood,—consumptive symptoms,—a certain affection of the lungs,—a certain affection of the liver,—and a cough, to wit, a cough of an inflammatory and dangerous nature. The sixth special plea alleged that the said John Scott, at the time of making the said declaration and statement, was afflicted with a disorder tending to shorten life; the seventh, that a certain thing alleged by the said John Scott in the said declaration, &c., was untrue, in this, that the said John Scott, at the time of his so making the said declaration, was not in good health; the eighth, that the said declaration was untrue, in this, that the said John Scott falsely averred therein that the said J. W. was, at the time of making the said declaration, his usual medical attendant; and the ninth alleged that the policy was made through the fraud, covin, and misrepresentation of the said John Scott. On all these pleas issues were joined.

On the trial of the cause, before Lord *Denman*, C. J., at the Summer Assizes for the county of Warwick, 1844, the defendant's counsel claimed the right to begin; but the Lord Chief Justice, after argument, ruled that the plaintiffs were entitled to begin, inasmuch as the onus of proving the issue on the seventh special plea (if not on others) lay on them. The plaintiffs' case having concluded, the defendant called witnesses, who proved that, about four years before the policy was effected, the assured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and it appeared that he died of consumption in the year 1843, at the age of thirty-

1845.

April 28.

LANGSTON v. WETHERELL.

On an application to a judge to hold a defendant to bail under 1 & 2 Vict. c. 110, s. 3, the plaintiff may use affidavits made and used shortly before on a similar application against the same defendant at the suit of another plaintiff, intitled in the former suit, and in another Court.

IN this case an application had been made to *Rolfe*, B., for an order to hold the defendant to bail under 1 & 2 Vict. c. 110, s. 3, on the ground that he was about to leave the country. The learned Judge thought the affidavit in support of the application insufficient, and adjourned the hearing to a future day, when, on the plaintiff producing an additional affidavit, the learned Judge made the order. This additional affidavit had shortly before been used by a different plaintiff on a similar application against the same defendant in the Court of Common Pleas, and it was intitled, "In the Common Pleas—*Revell v. Wetherell*." An application was afterwards made to the learned Judge to rescind his own order, on the ground that affidavits intitled in another cause and another court ought not to have been received by him; but his Lordship refused the application. A rule was thereupon obtained, calling upon the plaintiff to shew cause why the order of *Rolfe*, B., should not be rescinded, on the ground that it was founded upon the affidavit made in the Court of Common Pleas, which was not properly received.

Horn appeared to shew cause (April 25), but the Court called on

Udall to support the rule.—The affidavit, being intitled in another court, and made in a cause at the suit of a different plaintiff, was inadmissible, and ought not to have been received by the learned Judge. [*Alderson*, B.—Holding a person to bail is a purely collateral proceeding, not a step in the cause. Why may not a Judge satisfy himself whether a party is going abroad or not on such an affidavit? It is a matter on which perjury can be assigned.] The rule of H. T., 2 Will. 4, r. 4, pro-

1845.

May 6.

ASHTON v. ARCHIBALD PAUL BREVITT.

In trover, the first count was for twenty tons weight of hay; the second count for 100 bushels of barley, and twenty tons weight of straw; the third for 500 bushels of turnips. The defendant pleaded to the whole declaration, that, before and at the several times when &c., W. B. was lawfully possessed as of his own property of three equal undivided fourth parts of and in the goods in the declaration mentioned; that, before any of the times when &c., W. B., being so possessed thereof, delivered them to Richard Roe,

TROVER. The first count was for twenty tons weight of hay; the second count, for 100 bushels of barley, and twenty tons weight of straw; and the third count for 500 bushels of turnips.

Third plea (to the whole declaration), that, before and at the said time when &c., one William Brevitt was lawfully possessed, as of his own property, of and in three equal undivided fourth parts or shares, the whole into four equal parts or shares to be divided, of and in the several goods and chattels in the declaration mentioned; that, before any of the said times when &c., to wit, on &c., the said William Brevitt, then being possessed thereof in manner aforesaid, delivered the said goods and chattels to one Richard Roe, to be by him kept to and for the use of him the said William Brevitt; and the said Richard Roe, before any of the said times when &c., to wit, on &c., delivered the said goods and chattels to the plaintiff; whereupon the defendant, at the said several times when &c., as the servant of the said William Brevitt, and by his command, seized and took the said goods and chattels out of the possession of the plaintiff, and carried away the same,

to be by him kept for the said W. B.; and that the said Richard Roe, before any of the said times when &c., delivered them to the plaintiff: whereupon the defendant, as the servant of W. B., took them out of the possession of the plaintiff, &c., *quæ sunt eadem*.

Replication to the plea, so far as the same relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of the barley and seven tons weight of the straw, and divers, to wit, 200 bushels of the turnips, portions of the goods and chattels in the declaration mentioned, admitting that the defendant, as the servant of W. B., converted and disposed of the said *last-mentioned* goods and chattels as in the plea alleged, that W. B. was not possessed of the said undivided fourth parts as in the plea mentioned; and, as to the plea, so far as it relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of the barley and seven tons weight of the straw, and divers, to wit, 200 bushels of the turnips, other portions of the goods and chattels in the declaration mentioned; that, admitting that W. B. was lawfully possessed of and in three undivided fourth parts &c., of and in the several goods and chattels *last aforesaid*, yet that the defendant of his own wrong &c., converted and disposed of the said *last-mentioned goods and chattels*, &c.:—*Held*, on special demurrer to the replication, that it was bad for ambiguity, it being uncertain whether the "*last-mentioned goods and chattels*" referred to the whole of the goods mentioned in the declaration, or to the goods mentioned in the commencement of the replication.

Held, also, that the plea was a good answer to the declaration.

1845.
 ASHTON
 v.
 BREVITT.

chattels : that the traverses therein contained are too large, and improperly put the defendant to prove title and property, not only to the parts of the goods and chattels to which the replications are pleaded, but also to the residue of the goods and chattels in the declaration mentioned : that the said replications, and the traverses therein contained, are ambiguous and uncertain, in this, that it is at best doubtful whether the words "the said last-mentioned goods and chattels" include all or only portions of the goods and chattels in the declaration mentioned.

Joinders in demurrer.

Unthank, in support of the demurrer.—These replications are clearly bad for ambiguity. The words "last-mentioned goods and chattels" refer, in both of them, to the previous words, "the goods and chattels in the declaration mentioned;" and so, although the replications profess to answer the justification contained in the plea, as to a part only of the goods, they nevertheless raise issues under which the defendant must shew his title to the whole. A similar ambiguity was held fatal on special demurrer, in *Brancker v. Molyneux* (a). [*Parke*, B.—The question is, whether your plea is good.] *Morant v. Sign* (b) is an express authority in favour of this plea, which, while it admits an actual conversion, justifies it by the command of one of the joint-tenants of the goods. The defendant acts under the authority of a person who has an *interest* in the goods, as against a person who has a bare *possession*. [*Parke*, B.—They will say you should name the other joint-tenant.] There can be no reason for that; it is wholly immaterial who he is. [*Parke*, B.—You give the plaintiff a colour of title, but say that he cannot sue in trover a party who is equally entitled with himself to take and use the goods.] The Court then called upon

(a) 1 Man. & G. 710; 1 Scott, N. R. 553.

(b) 2 M. & W. 95.

vides, "that an affidavit sworn before a judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such Judge belongs, though not intitled of that court; but not in any other court, unless intitled of the court in which it is to be used." [*Alderson*, B.—That is because it is supposed to be in a cause in the court of which he is a judge.] Here the affidavit is sworn before a judge of the Court of Common Pleas, and is intitled in that court. Besides, the facts stated in the affidavits might be perfectly true at the time it was sworn, though not so at the time the affidavit was used in this court.

1845.
 {
 LANGSTON
 v.
 WETHERELL.

ALDERSON, B. (a)—The true test as to the admissibility of this affidavit is, to see whether perjury could be assigned upon it. Assuming the allegations to have been false at the time the affidavit was made, there is no doubt perjury could be assigned upon it; and for that purpose it would only be necessary to state that the perjury was committed in the cause in the Common Pleas, instead of in the cause in this court. As to the objection, that the facts stated in the affidavit might not be true at the time it was used in this court, the same objection might be raised against any affidavit which is used a month after it was sworn. I entertain no doubt that the affidavit was properly received; but I will consult the other Judges.

Cur. adv. vult.

ALDERSON, B., now said,—I have consulted the other Judges of this court, and they are unanimously of opinion that the affidavit was properly received. The rule will, therefore, be discharged with costs.

Rule discharged with costs.

(a) Sitting alone.

1845.
 ASHTON
 v.
 BREVITT.

ing would have been insensible upon any other construction; but that is not so here; the words may well be referred to the whole of the goods, as the last antecedent; and that would be a much better issue for you.]

Secondly, the plea is bad. It does not justify a conversion of any kind. The case is similar to that of *Ascue v. Sanderson* (a). There, in trover against the sheriff for sheep, the defendant justified the taking under a *fi. fa.*, absque hoc that he converted them aliter aut alio modo; and the Court held the plea bad, on the ground that it did not justify any conversion. [*Parke, B.*—You are too late to take the objection that the plea amounts to the general issue; it stands now on general demurrer.] The defendant does not shew anything which justifies the conversion he admits. [*Rolfe, B.*—Must it not, after verdict or on general demurrer, be taken to mean such a taking as amounts to a conversion?] Assuming that the plea sufficiently confesses a conversion, it affords no justification for it; for it admits any conversion which may be given in evidence under the declaration, but justifies a conversion by seizure only; and the *quæ sunt eadem* is mere form, and does not cure the objection.

Unthank, in reply.—*Acraman v. Cooper* (b), which may be referred to as an authority against this plea, is distinguishable, because there there was no admission at all of the conversion complained of, but a sort of denial of a conversion, by a special statement that the conversion complained of was a demand and refusal, which is no more than evidence of a conversion. But *Morant v. Sign* is a direct authority in favour of this plea. Evidence of the seizing and taking alleged therein would clearly have been evidence of an actual conversion, under not guilty. It does not appear (for this purpose) that the transaction

(a) Cro. Eliz. 433.

(b) 10 M. & W. 585.

was between two tenants in common: the colour is to the contrary. [*Parke, B.*—Undoubtedly, *Morant v. Sign* is exactly like this case; and according to that decision, the plea is a good answer *prima facie*.]

1845.
 ASHTON
 v.
 BREVITT.

POLLOCK, C. B.—It seems to me that the plea is good and the replication bad. There is little or no doubt what the pleader meant; but, when looked at with the technical nicety which is requisite on special demurrer, no doubt there is an ambiguity. The words may mean to refer to all the goods mentioned in the declaration; and, as this ambiguity is pointed out as cause of demurrer, we must hold the replication to be insufficient.

PARKE, B.—I am of the same opinion. I have no doubt what the pleader meant, but he has so expressed his meaning as to lead to an ambiguity, and that is pointed out by the special demurrer. The replication, being read as Mr. *Unthank* reads it, is perfectly intelligible. The replications are, therefore, bad for this ambiguity. With respect to the plea, it is a good answer, on the authority of *Morant v. Sign*, which is precisely the same case. It does not appear that it is a case of tenancy in common between the plaintiff and the defendant, but merely that colour is given to the plaintiff.

ALDERSON, B.—I am of the same opinion. The plea is good, on the authority of *Morant v. Sign*. As to the replication, I think it is bad, for the reason alleged as cause of demurrer; and I have no doubt, if this objection had been passed over, that the contest at the trial would have been whether the plaintiff was not entitled to have the larger issue proved.

ROLFE, B., concurred.

Judgment for the defendant.

1845.

May 6.

TURNER v. MASON.

Assumpsit for the wrongful dismissal of a domestic servant, without a month's notice or payment of a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his service during the night, that he refused such leave, and forbade her from so absenting herself, and that against his will she nevertheless absented herself for the night, and until the following day, whereupon he discharged her. Replication, that when the plaintiff requested the defendant to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness, and was in imminent

danger of death, and believing herself likely to die, requested the plaintiff to visit her to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c. :—*Held*, on demurrer, that the plea was good, as shewing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as shewing no sufficient excuse for such disobedience.

ASSUMPSIT. The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would become the servant of the defendant, to wit, in the capacity of housemaid, for certain wages, to wit, the wages of £7 for the year, the defendant promised the plaintiff to employ her in that capacity, and for the wages aforesaid, and to continue her in such situation until the expiration of a month after notice or warning given by the plaintiff or defendant, or either of them, to put an end to such service; and that, in case the defendant should put an end to such service without such notice or warning, he should pay to the plaintiff the said wages for a month. It then alleged that the plaintiff became the servant of the defendant upon the terms aforesaid, and that, although she was ready and willing to continue in such service, yet the defendant discharged her without such notice or warning as aforesaid. Plea, that before the defendant discharged the plaintiff, as in the declaration mentioned, to wit, on &c., the plaintiff requested the defendant to give her leave to absent herself from his dwelling-house, and from his said service and employ, during the then ensuing night, and until the following day, and thereupon the defendant then refused the said plaintiff such leave as aforesaid, and forbade her from absenting herself from the said dwelling-house, or from his said service or employ; and the said plaintiff then, without the leave and license and against

the will of the defendant, and disregarding her having been so forbidden as aforesaid, left the said defendant's dwelling-house, and his said service and employ, and absented herself therefrom, from the day and year last aforesaid, during the following night, and until the following day, and therefore the defendant did then discharge the plaintiff from his said service and employ. Verification.

Replication, that just before the said time when the plaintiff so requested the defendant to give her leave to absent herself from his said dwelling-house, and from his said service and employ, to wit, on &c., one Hannah Turner, the mother of the plaintiff, had been seized with sudden and violent sickness, and was then in imminent peril of death, and by reason thereof the said H. Turner believed herself likely to die, and being anxious to see the plaintiff before her death, had then requested the plaintiff to visit her, whereupon the plaintiff, at the said time when &c., requested the defendant to give her leave to absent herself from his said dwelling-house, and from his said service and employ, during the then ensuing night and until the following day, (the same being a reasonable time in that behalf), for the purpose of enabling the said plaintiff to visit her said mother in her said sickness, and to see her before her death; she the plaintiff not being thereby likely to cause any injury or hindrance to the said defendant in his domestic affairs and business, and not intending to be thereby guilty of any improper omission, or of any unreasonable delay of her duties as such servant; and because the defendant then wrongfully and unjustly forbade her from so absenting herself from his said dwelling-house, and from his said service and employ, she the plaintiff, for the purpose of visiting her said mother in her said sickness, and seeing her before her death, at the said time when, &c., left the defendant's said dwelling-house, and his said service and employ, and

1845.

TURNER
v.
MASON.

1845.
 TURNER
 v.
 MASON.

absented herself therefrom from the day and year, and for the time in the said plea mentioned, (the same being a reasonable time in that behalf), and for no other or longer period, or for no other or different purpose, she the said plaintiff not thereby causing any injury or hindrance to the defendant in his said domestic affairs or business, nor being thereby guilty of any improper omission or unreasonable delay of her duties as such servant of the said defendant as aforesaid, as she lawfully might for the cause aforesaid. Verification.

Special demurrer, assigning for causes, that the replication was a departure from the declaration, which alleges that the plaintiff was ready and willing to continue in the service of the defendant until a month after notice or warning; and that the replication admits a breach of contract, which justified the defendant in discharging the plaintiff. Joinder in demurrer.

Gray, in support of the demurrer, was stopped by the Court, who called upon

Badeley, *contra*.—The plea is bad in substance. The defendant thereby claims, under all circumstances, and without any limitation, to retain the plaintiff in his service, and not to permit her absence during the term of it. There is no allegation that he had any need of her services, or that her request to absent herself was unreasonable in itself, or for an unreasonable time or purpose. It is setting up a claim to slavery, instead of service. The contract of hiring and service must be construed, like all other contracts, reasonably. Suppose the plaintiff herself had been in peril of death, and had requested a day's absence for medical advice, would the defendant have been entitled to refuse that? Again, is she to forego in his service all moral claims and obligations? He does not allege that her excuse was false, or that her absence was

inconvenient. [Parke, B.—This is wilful disobedience of orders.] There may be a good reason for that. [Pollock, B.—Then it should come by way of replication.] But the master must shew it to be a wilful disobedience of *lawful* orders. [Alderson, B.—Surely it is a lawful order not to stay out all night.] *Fillicul v. Armstrong* (a) is an authority for the plaintiff. [Pollock, C. B.—That was not the case of a domestic servant.] In *Jacquet v. Bower* (b), a plea, to an action for wrongfully discharging the plaintiff and his wife from the defendant's service, that the wife obstinately refused to work for the defendant, wherefore he discharged them, was held bad on general demurrer. [Alderson, B.—That case only shews that *obstinately* does not necessarily mean *unlawfully*. Parke, B.—The obligation of a domestic servant is to obey all lawful commands. This plea sets out that which *prima facie* is a lawful command, which you must answer by the replication. Now here the replication alleges the extreme illness of the plaintiff's mother, but does not say the plaintiff gave the defendant notice of that fact; it only says that was the ground on which she applied for his permission, but not that she communicated it. Alderson, B.—If the mother be very poor, is the daughter to absent herself from her service to work for her, to prevent her starving? Pollock, C. B.—Or, if she has a right to go to the death-bed of her mother or father, why not of any other near friend?] The replication alleges expressly that the defendant had no need of her services. [Parke, B.—The master is to be the judge of the circumstances under which the servant's services are required, subject to this, that he is to give only lawful commands.] *Badeley* cited also *Levison v. Bush* (c), and *Callo v. Brouncker* (d).

POLLOCK, C. B.—I am of opinion that this plea is per-

(a) 7 Ad. & E. 557.

(b) 7 Dowl. P. C. 331.

(c) Lane, 65.

(d) 4 C. & P. 518.

1845.
TURNER
v.
MASON.

1845.
TURNER
v.
MASON.

fectly good. It discloses an order, in itself perfectly lawful, by the master of a servant, that she shall not leave his house for the night; and alleges, that, notwithstanding that order, she did leave his house and his service, and staid out all night. She had no right, against his will, to leave his service at all. The plea is therefore a good plea. Then the replication states, that the mother of the plaintiff was ill, and in peril of death, and that, believing herself likely to die, and being anxious to see the plaintiff before her death, she had requested the plaintiff to visit her, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose; and because he wrongfully refused it, she did absent herself for that purpose, for the time mentioned in the plea. It does not state that she gave the defendant any notice of the purpose for which she desired to absent herself, or that her doing so was of advantage or use to her mother, but merely that it was to visit her that she might see her before her death. It is very questionable whether any service to be rendered to any other person than the master would suffice as an excuse: she might go, but it would be at the peril of being told that she could not return. The plea being therefore good, and the replication bad in form, our judgment must be for the defendant.

PARKE, B.—I am of the same opinion. The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. It was laid down by Lord *Ellenborough* in *Spain v. Arnott* (a), and by me in *Callo v. Brouncker*, and confirmed by the Court of Queen's Bench in *Amor v. Fearon* (b), that the wilful disobedience of any

(a) 2 Stark. 265.

(b) 9 Ad. & E. 548; 1 P. & D. 398.

lawful order of the master is a good cause of discharge. Here the plea discloses a perfectly lawful order, namely, that the defendant should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. *Primâ facie*, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication shewed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to shew that the defendant had any notice or knowledge of the mother's illness. It is therefore clearly bad, and our judgment must be for the defendant.

ALDERSON, B.—I am of the same opinion. The plea is a good answer to the action, because it shews the discharge of the plaintiff to have been for wilful disobedience of the defendant's order to stay in his house all night. Then, is the replication a good answer to the plea? It is informal, because it does not shew that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But if this were otherwise, these circumstances would amount only to a mere moral duty, and do not shew any legal right. We are to decide according to the legal obligations of parties. Where is a decision founded upon mere moral obligation to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties. There may, undoubtedly, be cases justifying

1845.

TURNER
v.
MASON.

1845.
 TURNER
 v.
 MASON.

a wilful disobedience of such an order; as where the servant apprehends danger to her life, or violence to her person, from the master; or where, from an infectious disorder raging in the house, she must go out for the preservation of her life. But the general rule is obedience, and wilful disobedience is a sufficient ground of dismissal.

ROLFE, B.—In truth, the cases suggested by my brother *Alderson* are cases in which there is not legally any disobedience, because they are cases not of lawful orders. It is an unlawful order to direct a servant to continue where she is in danger of violence to her person, or of infectious disease.

Judgment for the defendant.

May 5.

MASON v. NICHOLLS.

Since the 7 & 8 Vict. c. 96, a defendant may be taken in execution, in an action on the judgment recovered, though the debt recovered in the former suit was under £20, and the second action is brought within a year.

ATHERTON moved for a rule to discharge the defendant out of custody; relying on the provisions of the 7 & 8 Vict. c. 96, s. 57, against charging defendants in execution on judgments in actions wherein the debt recovered is under twenty pounds. It appeared on affidavit, that, in a former action, the plaintiff had recovered against the defendant a debt of £10, with £30 taxed costs in that suit. On this judgment debt of £40, the present action had been brought unnecessarily, as the judgment was not a year old at the time of the commencement of this action; and with the sole object (as sworn on belief) of taking the defendant in execution. Judgment having been obtained by the plaintiff in the action on the judgment, but no costs of such second action being ordered by

the Court or a Judge, the defendant had been taken in execution in that suit for the £40, the debt recovered thereby

1845.
MASON
v.
NICHOLLS.

Atherton contended that the object of the second action was to evade the provisions of the above act, and, by adopting a circuitous course, to take the debtor in execution for a debt under £20, which the Court ought not to allow. It was an abuse of the process and practice of the Court to employ them for such purposes of evasion. [*Rolfe*, B.—We have refused to interfere on many similar applications of this nature.]

PER CURIAM.—The creditor clearly had a right, notwithstanding the act, to bring an action on the judgment in the former action; taking his risk of losing his costs of the second action, which the Court were not in the practice of giving (a).

Rule refused (b).

(a) The 43 Geo. 3, c. 46, s. 4, provides, that, in actions on *judgments recovered*, the plaintiff shall not recover, or be entitled to, any costs of suit, unless the Court in which action on the judgment shall

be brought, or a judge thereof, shall otherwise order.

(b) See also the concluding observation of *Parke*, B., in *Hopkins v. Freeman*, 13 M. & W. 373.

1845.

May 5.

HODGINS v. HANCOCK, Executor, &c.

Where a declaration in debt on a promissory note gave credit for part payment of the principal and interest:—

Held, that the allegation of part payment was not traversable, and consequently that a plea traversing that allegation was bad.

In the construction of the rule for the delivery of paper-books to the judges before argument, Sunday is to be counted as one of the four days between the delivery of paper-books and the day of argument, except it is the last day.

DEBT against the defendant, as executor of one Anne Cooke deceased. The declaration, which was dated in November 1844, alleged that the testatrix in her lifetime, to wit, on the 14th of July, 1837, made her promissory note in writing, and thereby on demand promised to pay to the said plaintiff the sum of £90, together with lawful interest for the same; and although the said A. Cooke, in her lifetime, paid and satisfied to the plaintiff the sum of £10, parcel of the said sum of £90, and also 21*l.* 2*s.* 6*d.* for and on account of the said interest, &c., yet the residue of the said sum of £90, amounting to a large sum of money, to wit, to £80, and the residue of the said interest, amounting at the time of the commencement of the suit to £6, still remained unpaid, whereby an action had accrued, &c.

The defendant by his plea traversed the allegation that the said A. Cooke, in her lifetime, paid to the plaintiff the said sums of money in the declaration mentioned, or either of them, or any part thereof.

To this plea the plaintiff demurred specially, on the ground that it tendered an immaterial issue.

Huddleston, on appearing in support of the demurrer, objected, that the defendant could not be heard until he had paid for his paper-books, which had been delivered for him by the plaintiff under the practice rule of Hil. Term, 4 Will. 4, s. 7, which provides, that “*Four clear days* before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, &c., to the Lord Chief Justice of the King’s Bench, or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought, and the defendant shall deliver copies to the other two judges of the Court next in seniority; and in default thereof by either

party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited a sufficient sum of money to pay for such copies."

In the present case, it appeared that, the demurrer standing for argument on Monday, the 20th of January, the plaintiff delivered his paper-books on Tuesday, the 14th. The defendant not having delivered his paper-books, the plaintiff on the following morning delivered them for him; but, at a later hour on that day, the defendant delivered his own paper-books.

P. M'Mahon, for the defendant, insisted that the defendant had delivered his own paper-books in due time; that the term *clear days* meant full days; and that Sunday, the 19th, was to be counted as one of the days. It is said that *clear days* mean working days, but there is no authority for such a position.

POLLOCK, C. B. — On principle, it is difficult to see, if nothing is to be done on that day, why Sunday should not be sufficient to constitute one of the days; and, on referring to the Masters of the Court, they report to us that they have been in the habit of acting on that rule, and considering Wednesday for the Monday following as sufficient (*a*).

Huddleston, in support of the demurrer.—The plea puts in issue matter which is immaterial to the determination

(*a*) A discrepancy existing in the practice of the different Courts in this respect, the matter was taken into consideration by *Parke, B.*, and *Wightman* and *Erle, Js.*, and the following rule was afterwards promulgated, dated the 12th

June, 1845:—"We think that Sunday ought to be counted as one of the four days between the delivery of paper-books and the day of argument, except it is the last, when it is to be omitted, according to the general rule."

1845.
HODGINS
v.
HANCOCK.

1845.
 HODGINS
 v.
 HANCOCK.

of the cause. Although the plaintiff gives credit in his declaration for part payment, that was only for the purpose of preventing the necessity of a plea of payment, according to what is suggested in *Kenyon v. Wakes* (a), but that does not render the allegation of part payment material and traversable. If issue were joined on that traverse, there must be a repleader, as a verdict found upon it would not decide the merits of the action either way. That is the proper test to shew whether it be material or not. [*Pollock*, C. B.—Suppose the case of a promissory note, payable by four instalments, and the declaration in an action upon it were to allege, that although the defendant had paid the first and second instalments, he did not pay the third and fourth, and the defendant pleaded that he did not pay the first and second instalments, would that be any answer to the action? I cannot distinguish that case from the present.]—*Huddleston* referred to *Hollis v. Palmer* (b).

P. M'Mahon, contra. — There is no authority to shew, that where a plaintiff makes a substantial averment of a fact, he can demur to a plea for traversing that allegation. When any special and substantial matter is alleged, it is traversable, and ought to be answered, Co. Lit. 303 b.; and, although the particular allegation might not be essential to the maintenance of the action in the first instance, yet the plaintiff may make it material by introducing it in the declaration. [*Alderson*, B.—How does this traverse answer the action?] The allegation of part payment assists the plaintiff, by taking the case out of the Statute of Limitations; for, without that, the declaration shews on the face of it that the cause of action accrued more than six years before the action was brought; and, in *Stafford v. Forcer* (c), it is said that “formerly it was held that

(a) 2 M. & W. 764.

(b) 2 Bing. N. C. 713; 3 Scott, 265.

(c) 10 Mod. 311.

parties should not take advantage of the Statute of Limitations without pleading it; but now the law is otherwise." [Pollock, C. B.—You may find authority in the Modern Reports for many propositions that are not law. It has been always held that to take advantage of the statute you must plead it.] Admitting that to be so, the allegation having been made by the plaintiff, the defendant may traverse it.—He cited *Bill v. Lake* (a), and *Sarsfield v. Witherby* (b).

1845.
HODGINS
v.
HANCOCK.

POLLOCK, C. B.—I am of opinion that our judgment must be for the plaintiff. With respect to the Statute of Limitations, it has been laid down for a great many years, that, if you wish to avail yourself of the statute, you must plead it; and this, even though it appear on the face of the declaration that the cause of action had accrued more than six years before the action brought. There are, it is true, some old cases to the contrary, but they are not law at this day. The allegation in this declaration is simply that of an alleged cause of action, reduced by part payment.

ALDERSON, B.—When it is said that you may traverse any substantial allegation, that must be understood to be some allegation material to the maintenance of the action. But how can it be said to be material, when a man goes for the residue of a demand, to deny that he was paid the former part? This declaration would be good, although the allegation of part payment were struck out of it.

ROLFE, B., concurred.

Judgment for the plaintiff.

(a) Hetley, 138.

(b) Carthew, 82.

1845.

May 6.

Trespass for breaking and entering the plaintiff's dwelling-house, and removing his goods. Plea, that after the passing of the 1 & 2 Vict. c. 74, C., one of the defendants, as agent of M., made his complaint in writing before justices of the peace acting for the hundred of R., being the district wherein the said dwelling-house &c., therein-after mentioned were situate, and then in petty sessions assembled &c., and thereby said that M. let to the plaintiff a tenement, consisting of &c., being the said dwelling-house &c., situate &c., for a term of one year, and so from year to year, under the rent of 4*s.*, and that the tenancy was determined by notice to quit given by C., on behalf of M., the owner of the said tenement, on &c., and that on &c., C., as agent and on behalf of M., served on the plaintiff a notice in writing of his intention to apply to recover possession of the said tenement. The plea then set out the notice, which was according to the form given in the schedule of the act; and alleged, that complaint having been so made, and proof given to the justices of the holding and determination of the tenancy, with the time and manner thereof, they the said &c., being two of the justices acting for the district in which the said tenement was situate, duly issued their warrant, directed to the defendants, and all other constables and peace officers acting for the several parishes within the hundred of R., reciting &c., and thereby authorized and commanded the defendants, and other constables and peace officers, or any of them, to enter on the said tenement, and deliver possession thereof to C. as such agent. The plea then justified the breaking and entering the premises, and removing the goods, by virtue of the warrant:—*Held*, on demurrer, that the plea was bad, for want of a distinct averment that any of the defendants was a constable or peace officer of the district within which the premises were situate.

JONES v. CHAPMAN, WILLIAMS, PRICE, and JONES.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing his goods, and removing them to a close adjoining the said dwelling-house, and keeping them so removed for a long time, to wit, six hours.

Plea (by all the defendants except Chapman), that before the committing of the trespasses in the first count mentioned, and after the passing of a certain act of Parliament, made and passed in the second year of the reign of her Majesty, intituled "An Act to facilitate the Recovery of Possession of Tenements, after due determination of the Tenancy," [1 & 2 Vict. c. 74], to wit, on the 5th day of March, in the year of our Lord 1842, the defendant Henry Chapman, then being the agent of one Harriet Myddelton, and as such agent, made his complaint in writing before her Majesty's justices of the peace acting for the district of Ruthin, in the county of Denbigh, being the district wherein the said dwelling-house, tenements, and premises hereinafter next mentioned were and are situate, and then in petty session assembled, to the number of two and more, and thereby said, that the said H. Myddelton, by her agent, George Adams, esquire, did let to the plaintiff a tenement, consisting of a messuage, called Bryn-y-ffynnon (being the said dwelling-house in the said first count mentioned, and in which &c.), with the out-

buildings, lands, and premises thereunto belonging, containing 3 A. 1 R. 32 P., or thereabouts, with the appurtenances, situate in the township of Aberwheeler, in that part of the parish of Bodffary which was in the said county of Denbigh, for a term of one year, and so on from year to year, under the rent of 4s., and that the said tenancy was determined by notice to quit, given by him the said defendant Chapman, as agent to and on behalf of the said H. Myddelton, the owner of the said tenements, on the 30th day of November then last past; and that, on the 28th day of January then last past, the said defendant Chapman, as agent for and on behalf of the said H. Myddelton, did serve on the said plaintiff a notice in writing of his intention to apply to recover possession of the said tenement, a duplicate of which notice was thereto annexed; and that, notwithstanding the said notice, the said plaintiff did refuse to deliver up possession of the said tenements, and then still detained the same: unto which said complaint a duplicate of the said notice of intention to make the said application was then annexed. [The plea then set out the notice, in the form given in the schedule to the act.] And the defendants J. Williams, R. Price, and P. Jones further say, that the said complaint having been so made, and proof having, to wit, then been given to the said justices at petty sessions assembled as aforesaid, by the said defendant Chapman, as agent of the said H. Myddelton as aforesaid, of the holding and due determination of the said tenancy of the plaintiff, with the time and manner thereof, the said justices, so assembled in petty sessions as aforesaid, that is to say, the Rev. Edward Thelwall, clerk, and Thomas Downward, esq., then being two of the justices acting for the said district in which the said tenement was situate, then, to wit, on the said 6th day of February. in the year aforesaid, duly issued their warrant under their hands and seals, directed to the said defendant T. Williams, to J. Jones, and all other constables and

1845.
 JONES
 v.
 CHAPMAN.

1845.
JONES
v.
CHAPMAN.

peace officers acting for the several parishes within the hundred of Ruthin, in the said county, and thereby, after reciting the said complaint of the said defendant Chapman, and that the said matters alleged therein were fully proved before them the said justices, upon the oaths of credible witnesses, the said justices did authorize and command the said T. Williams and J. Jones, and the said other constables and peace officers, or any of them, on any day, being not less than twenty-five nor more than thirty clear days from the date thereof, between the hours of nine in the forenoon and four in the afternoon, to enter, by force if needful, and with or without the aid of the said defendant Chapman, as such agent as aforesaid, or any other person or persons whom they might think requisite to call to their assistance, into and upon the said tenement and premises, and to eject thereout any person, and of the said tenement and premises full and peaceable possession to deliver to the said defendant Chapman, as such agent as aforesaid: and the defendants T. Williams, R. Price, and P. Jones say, that the said warrant being so made and issued, the said defendant T. Williams, under and by virtue thereof, at the said time when &c., in the said first count mentioned, being a day not less than twenty-five nor more than thirty clear days from the said 6th day of February, A.D. 1843, the date of the said warrant, and between the hours of nine in the forenoon and four in the afternoon of the same day, broke and entered the said dwelling-house in which &c., in the said first count mentioned, being part of the said tenement in the said warrant mentioned, in order to deliver possession of the same to the said defendant Chapman, as such agent as aforesaid; and it being then necessary for the said defendant T. Williams, in order to execute the said warrant, to call other persons to his assistance in the execution thereof, the said defendants, R. Price and P. Jones, being then so called to the aid of the said defendant T. Williams, and by him then required to

1845.
JONES
v.
CHAPMAN.

it sufficiently appear in or from the said plea, that the plaintiff ever was tenant of the said premises, or any of them, or any part thereof, to the said H. Myddelton, or that the said supposed tenancy was or is determined, or that the plaintiff was ever served with such notice as is by the said act of Parliament required in that behalf, or that he refused or neglected to quit or deliver up possession of the said premises, or any of them, or any part thereof; or that any proof was given to the justices before or at the time of the granting or issuing of the said warrant in the said plea mentioned, or at any time whatever, of the service of such notice as aforesaid, or of the neglect or refusal of the plaintiff as aforesaid.—Joinder in demurrer.

The defendants' points marked for argument were—that it is not necessary to allege specifically that the defendant Williams was a constable or peace-officer of the district, inasmuch as the warrant of the justices made him a special constable *pro hac vice*, and conferred upon him authority to execute the warrant. That it is sufficient for the constable, or other person justifying under a warrant, to shew, that on the face of the warrant itself there was jurisdiction and competent authority in the justices to issue the warrant, and that sufficient appears on the plea to protect the constable, and others called to his aid, in executing the warrant according to the exigency thereof.

Welsby, in support of the demurrer.—This plea is clearly bad, for several of the reasons assigned as causes of demurrer. Wherever it is sought specially to justify a trespass under the authority of a warrant or order of justices, every fact must be distinctly averred which was necessary to shew the jurisdiction of the justices, the validity of the warrant, and the regularity of its execution. Now, by the stat. 1 & 2 Vict. c. 74, on which this plea is founded, and which provides in certain cases a summary mode of obtaining the possession of premises after the de-

1845.
 JONES
 v.
 CHAPMAN.

mitted that it gives protection only to a party who shews himself to be a constable or peace officer, and where the proceedings have been pursuant to the provisions of the act; but it subsequently appears that the party applying for the warrant had no lawful right to the possession. And the plea clearly cannot be regarded as a sufficient justification at common law. The observations of *Tindal*, C. J., in *Morrell v. Martin (a)*, are applicable to this point.—He was then stopped by the Court, who called upon

Peacock, in support of the plea.—This is not an action brought against the justices, but against the constable and others who acted under their warrant; and therefore the defendants are within the protection of the stat. 24 Geo. 2, c. 44. [*Parke*, B.—That act does not apply. This is the case of parties justifying under a statute which gives a special authority to a constable of the district only.] The object of the 24 Geo. 2, c. 44, was to afford protection to all persons acting in obedience to a justice's warrant. [*Parke*, B.—Under the statute of Victoria, no officer would be justified in executing the warrant, except the constable of the district, division, or place in which the premises are situate. Such constable has a right to say, "You must bring your action against the justices, and not against me;" but here it is not shewn that the party who executed the warrant was a constable of the district, and therefore no question arises on the application of the 24 Geo. 2, c. 44. The defendants have clearly failed to make out that they are entitled to the possession.]

PER CURIAM,

Judgment for the plaintiff.

(a) 3 Man. & G. 590; 4 Scott, N. R., 300.

1845.
 HINTON
 v.
 HEATHER.

torn, and his hand and thumb bruised. The defendant indicted the plaintiff and the housekeeper at the next Middlesex sessions for an assault, and upon the bill being found, a bench warrant was, at the defendant's instance, issued for the apprehension of the plaintiff, upon which he was taken into custody by a policeman and conveyed to a police station, where he gave bail for his appearance at the following sessions. At those sessions the indictment was tried, and after an examination of witnesses on both sides, the plaintiff was acquitted.

It was objected for the defendant, at the close of the plaintiff's case, that there was no evidence of want of reasonable and probable cause for the indictment, inasmuch as the plaintiff had in fact committed an assault on the defendant; for which *Fish v. Scott* (a) was cited as an authority. The Lord Chief Baron ruled that the case must go to the jury, but gave the defendant leave to move to enter a nonsuit, if the Court should be of a contrary opinion; and in summing up, his Lordship stated to the jury, that if they thought the indictment was preferred by the defendant with a consciousness that he was in the wrong in the transaction, it was, in his opinion, without reasonable or probable cause; but that if more violence was used by the plaintiff on the occasion than was necessary to remove the defendant from the premises, there was reasonable and probable cause for the prosecution. The jury found a verdict for the plaintiff, damages £20.—In a former part of this term, (April 17 and May 3),

Crowder moved to enter a nonsuit, pursuant to the leave reserved, or for a new trial, on the ground of misdirection; relying on *Fish v. Scott*, and contending, that inasmuch as the defendant appeared not to have known that the apartments where the assault took place were the premises of

(a) Peake, 135.

1845.
HINTON
v.
HEATHER.

sciousness that he was in the wrong, it was, in my opinion, without reasonable or probable cause; and the Court concur in the correctness of that mode of presenting it to the jury. Then, if the matter was for the jury, I am not dissatisfied with the conclusion they came to, and therefore there will be no rule.

ALDERSON, B.—Without doubt, reasonable and probable cause is a question for the Judge, the moment the facts are determined; but if the facts remain in dispute, the jury must ascertain them, and then the judge is to direct them whether, in point of law, the facts so ascertained do or do not amount to want of reasonable or probable cause. In this case there are two contradictory statements, one of which seems sufficient to give the defendant a defence, on the ground that there was no want of reasonable and probable cause. On the other hand, the evidence on the part of the plaintiff is directly the reverse. The Lord Chief Baron then asks the jury, in substance, whether or not the assault upon the defendant, who first assaulted the plaintiff, was committed under such circumstances as that no reasonable man could have supposed that there was any excess in it. No doubt the plaintiff would be indictable for the assault committed by him in return, if it were excessive; and without doubt, also, the assault might not be excessive, and yet the defendant might have reasonable and probable cause for the indictment, because he may reasonably have supposed it to be excessive. The jury, therefore, are called upon to inquire whether or not the facts are such as that no reasonable man could have supposed the assault to be excessive. If that be the result of the facts, then it is clear there was no reasonable and probable cause for indicting the plaintiff. The question is, whether the defendant has been assaulted in such a manner as that the plaintiff is indictable for it. The substance of what the Chief Baron left to the jury was this,—

1845.

May 7.

STEELE v. HARMER, BENHAM, and LAYTON.

In an action by the indorser against the acceptors of a bill of exchange, the defendants, who were under terms to plead issuably, pleaded (amongst others) the following pleas:—
First, that after acceptance and before indorsement to the plaintiff, the drawer waived the acceptance, and discharged the defendants from payment thereof, of which the plaintiff had notice. Secondly, that after the making and accepting of the bill, and before it became due, it was delivered by the defendants to W. the drawer, and that after it was so accepted and delivered, and while W. was the holder and payee thereof, and before it became due, W. indorsed it to H., one of the acceptors, and then delivered it to H., with the intention of divesting himself, and thereby he did divest himself, of all right, title, &c. in the bill, and of the right of suing thereon, and of indorsing the same again; that it was indorsed to H. for a valuable consideration; that H. continued to be the holder of the said bill always from the time of the indorsement thereof until it was afterwards delivered by H. to the plaintiff; and that at the time when the bill was so delivered to the plaintiff by H., the plaintiff had notice of all the facts:—
Held, that these were issuable pleas.

ASSUMPSIT by the indorsee against the acceptors of a bill of exchange, drawn by one W. Wood.

The defendants Benham and Layton, being under terms of pleading issuably, pleaded, amongst others, the following pleas:—

1. That after the defendants had accepted the said bill, and before it became due, and before it was indorsed to the plaintiff, to wit, on &c., the said William Wood waived the acceptance of the said bill, and exonerated and discharged the defendants from the same, and from the payment of the said bill, of all which premises the plaintiff, before and at the said time of the said indorsement of the said bill to the plaintiff, had notice and knowledge. Verification.

2. That after the making and accepting of the said bill, and before it became due, to wit, on &c., the same was delivered, so accepted by the defendants, to the said W. Wood, and that after the said bill was so accepted and delivered, and while the said W. Wood was the holder and payee thereof, and before it became due, to wit, on &c., the said W. Wood indorsed the bill to the said J. Harmer, the other acceptor, and then delivered it, so indorsed, to the said J. Harmer, with the intention of divesting himself, and thereby he did divest himself, of all right, title, &c. in the bill, and of the right of suing thereon when the same should become due, and of indorsing the same again; that when the bill was so indorsed to the said J. Harmer, it was indorsed for a good valuable consideration then paid to the said W. Wood; that the said J. Harmer continued to be and was the holder

1845.
 STEELE
 v.
 HARMER.

who is the holder of the bill at the time it becomes due. That obligation cannot be discharged except by payment, accord and satisfaction, or a release. [*Pollock*, C. B.—The plea states, that before the bill became due, and before the indorsement to the plaintiff, the drawer waived the acceptance.] The second plea also is not issuable. It attempts to set up as an answer to the action the delivery of the bill by Wood to one of the acceptors. But that is immaterial, inasmuch as it was indorsed to the plaintiff before it became due, and there is nothing stated in the plea which shews that he is not a holder for value.

Jervis, in support of the rule.—First, a waiver of acceptance is a good plea, and there is no necessity to shew any consideration for it, except under particular circumstances, where the renunciation is partial. The liability of an acceptor may be discharged by an express renunciation of his claim by the holder: *Byles on Bills*, 147 (a). Here the plea states, that before the indorsement to the plaintiff the drawer waived the acceptance, and thereby the liability of the defendants was discharged. *Stevens v. Thacker* (b) and *Whatley v. Tricker* (c) are in point. The second plea is also good. The delivery of the bill to one of the acceptors by the holder before it became due, with the intention of divesting himself of all rights upon the bill, is equivalent to a payment by all; and the right of action being once extinguished, the plaintiff could not afterwards acquire any title to sue on the bill. In *Freakley v. Fox* (d), it was held, that where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has indorsed it. Here the same consequences follow from the delivery of

(a) 4th edit.

(b) Peake, 187.

(c) 1 Campb. 35.

(d) 9 B. & C. 130; 4 Man. & Ry. 18.

1845.
 {
 HARRISON
 v.
 LUKE.

returned the following answer:—"I have no objection taking eight or ten tons of ochre, and you take paint, or any other article, in exchange. Should you feel inclined to barter, please let me know as early as possible." The parties accordingly supplied each other, and continued to deal on this footing for some time, exchanging paint for ochre, until March, 1841, when the balance was in the plaintiff's favour; and in a postscript to a letter, dated the 1st of March, 1841, from the plaintiff to the defendant, the plaintiff requested defendant to send ochre "*to balance our account.*" No more ochre, after this time, was received by the plaintiff. The action was brought in December, 1844. At the trial it was objected for the defendant, that the plaintiff ought to be nonsuited, as, the transaction being one of barter, he was not entitled to recover the value of the goods in money. The learned Recorder directed a verdict for the plaintiff for the amount proved, giving leave to the defendant to move to enter a nonsuit.

Bain having obtained a rule accordingly,

Archbold now shewed cause.—The plaintiff is entitled to maintain an action for goods sold. [*Pollock*, C. B.—The question is, whether it is a transaction of barter, or of the sale of goods, and whether you ought not to bring your action against the defendant for not sending goods in return.] Where two parties enter into a contract of barter, and one of them omits for a long time to send goods corresponding in value with those which have been sent to him, and the balance is ascertained, that is evidence of an agreement by the person who omits to send goods to pay for what he has received in money. In *Ingram v. Shirley* (a), it was held, that upon an agreement between two traders to supply each other, on the footing of goods for goods, after a balance struck between them, such

(a) 1 Stark. N. P. C. 185.

a balance is to be paid in money. There Lord *Ellenborough* was of opinion, that "upon a balance struck, the amount of the balance was due in money, otherwise there would be no end of the dealings." [*Alderson*, B.—Suppose, in that case, there had been the words, "send the balance in goods," Lord *Ellenborough* would not have said what he did. The delay to send the goods would not alter the nature of the contract.] *Garey v. Pyke* (a) shews, that if there be a settlement of account, the plaintiff is entitled to recover.

1845.
HARRISON
v.
LUKE.

Bain, contra, was stopped by the Court.

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute. Where there is a contract of barter, and one of the parties omits to send goods in return, it cannot be contended that the other may bring an action for goods sold. No mere lapse of time will turn a contract of barter into a contract for goods sold.

PARKE, B.—The plaintiff's remedy is by an action against the defendant for not delivering the ochre pursuant to the contract between them. The ground of Lord *Ellenborough's* decision in *Ingram v. Shirley* was, that the parties, by stating a balance of £25 to be due, intended that amount to be paid in money. But, if there be a contract of barter, you cannot change that into a contract to pay in money, unless the parties come to a fresh agreement to that effect. The defendant's not sending the ochre is a breach of the old agreement only.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

(a) 10 Ad. & Ell. 512; 2 Per. & D. 427.

1845.

May 7.

EVANS v. The DUBLIN and DROGHEDA RAILWAY
COMPANY.

An act incorporating a company for making a railway from Dublin to Drogheda enacted, that in case of any summons or writ upon the company, "personal service thereof upon a secretary or clerk of the company, or leaving the same at the office of the company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the usual place of abode of such secretary or clerk, or, in case the same respectively should not be found or known, then personal service thereof upon any other agent, &c., or on any director of the company," should be deemed good service. A writ of summons having been issued out of this Court into Middlesex against the

company, who had not any office in England, or any secretary or clerk to represent them here, was served upon one of the directors of the company in London:—*Held*, that such service was null and void; that the proper service was upon the secretary or clerk at the office; but that the parties, residing in Ireland, were not amenable to the jurisdiction of this Court.

THIS was a rule calling upon the plaintiff to shew cause why the judgment, and all proceedings subsequent to the issuing of the writ of summons, and also an order of *Platt*, B., if necessary, should not be set aside. By stat. 6 & 7 Will. 4, c. cxxxii, (local and personal), sect. 1, a body of persons was incorporated by the name and style of The Dublin and Drogheda Railway Company, with power to sue and be sued by that name, and with power to purchase, hold, and sell land, &c. And by the 184th section it is enacted, that "in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ or other proceeding at law or in equity, upon the said company, personal service thereof upon a secretary or clerk of the said company, or leaving the same at the office of the said company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the last or usual place of abode of such secretary or clerk, or, in case the same respectively shall not be found or known, then personal service thereof upon any other agent of or officer employed by the said company, or on any one director of the said company, or delivering the same to some inmate of the last or usual place of abode of such agent, or officer, or director, shall be deemed good and sufficient service of the same respectively on the said company." The plaintiff had, on the 12th of December, 1844, sued out of this Court a writ of summons in an action of debt, and directed it "To the Dublin and Drogheda Railway Company, a director of

1845.
EVANS
v.
DUBLIN AND
DROGHEDA
RAILWAY Co.

judgment signed herein be set aside, the defendants pleading issuably within ten days; and that, in default of payment of the said costs within the time aforesaid, or of pleading within the time aforesaid, the defendants' application to set aside the judgment be discharged, with costs, to be paid by the defendants to the plaintiff, or to Messrs. Sharpe & Co., his attorneys." This order having been drawn up by the plaintiff's attorneys,

Peacock, on the 23rd of April, obtained the above rule to set aside the judgment, and all proceedings subsequent to the writ of summons, and the above order of *Platt*, B., if necessary, on affidavits stating the above facts. The affidavits also stated, that the office of the Dublin and Drogheda Railway Company, ever since its incorporation, was at No. 22, Marlborough-street, Dublin, and that the deponents believed this to have been known to the plaintiff; and that the company never had any secretary, office, clerk, or place of business in England, nor any director there representing or acting for the company.

Crompton now shewed cause. There are two questions in this case: first, whether service of the writ, under this act, upon one of the directors of the company in London was good service; secondly, whether the application to set aside the judgment was made in due time. First, the service on one of the directors in London was sufficient. Service on the secretary or clerk would clearly be sufficient service, and there is nothing in the act to confine it to Ireland; and therefore service on the clerk or secretary would be good, if made here. Then the act provides, that leaving the process at the office of the secretary or clerk, or at the last place of abode of such secretary or clerk, or, in case the same shall not be found or known, then personal service thereof upon any other agent of the company, or on any one director of the company, shall be deemed good service. Now there is nothing to confine this service to

Ireland; and, as this action is brought in Middlesex, the act must mean that the writ should be served where such a writ can be served, namely, in England. [*Alderson*, B.—It means, where it would probably come to the knowledge of the company. If no secretary, or office, could be found, then it may be served upon a director. *Parke*, B.—You can have no right to serve a director, until you have tried without success to serve the secretary or clerk, either personally, or at the office, or upon an inmate there. Service at the office is the proper service. The parties capable of being served live in Ireland, and are not amenable to the jurisdiction of this Court. *Alderson*, B.—The proper service is a service on the secretary at the office in Ireland.]

Assuming, then, that this service is not in compliance with the act, still it is not a nullity, but is at most an irregularity, and the party served was bound to come within a reasonable time to move to set it aside; 1 Chit. Archb. 107, 116; and the Court will not set aside process, where the party moving has allowed the plaintiff to take fresh steps. In this case the defendants knew that one of the directors had been served with the writ of summons and declaration, and that it had been stuck up in the office. [*Pollock*, C. B.—And you knew that they were objecting all the time to your proceedings, and they gave you notice that you must proceed at your peril.] That makes it stronger, as they ought to have applied to the Court. In order to answer the objection as to delay, the parties should shew that the facts did not come to their knowledge. [*Parke*, B.—Suppose this were the case of an Irishman residing in Dublin, and that a writ directed to him from this court were served upon some person here, who had no connexion whatever with him, could he not now apply to set aside the proceedings? He would not be amenable to this Court. Now this is precisely that case, for one of the directors is not the company.] Where a party has been

1845.
 EVANS
 v.
 DUBLIN AND
 DROGHEDA
 RAILWAY Co.

1845.
 EVANS
 v.
 DUBLIN AND
 DROGHEDA
 RAILWAY CO.

served in a wrong county, it is not considered a nullity. [*Alderson*, B.—A personal service is sometimes presumed from that which is equivalent to it; and where you assume a man to have been served in a particular county, though in fact he was not, you assume a service which would have been good. But here we are asked to presume a good service in Ireland, from an act done here, which would be bad if done in Ireland].

Rule absolute, but without costs.

May 8.

LEAF v. TOPHAM and Another (a).

In an action for the infringement of a patent, the defendant delivered a notice of objections, one of which stated that the patentee did not, by the specification in the declaration mentioned, sufficiently describe the nature of the supposed invention; and the other stated that he had not caused any specification sufficiently describing the nature of the supposed invention to be duly inrolled in Chancery:—*Held*, that the last objection was not sufficiently precise; and the Court ordered an amendment, which was made by inserting the word “other” before “specification.”

CASE for the infringement of a patent, of which the plaintiff was assignee. The patent, which had been granted to one J. V. Desgrand, was for “a certain method of weaving elastic fabrics.”

The defendant pleaded, sixthly, that the said J. V. Desgrand did not, by the said specification and instrument in writing under his hand and seal, in the declaration mentioned, particularly describe and ascertain the nature of the said supposed invention. Seventhly, that the said J. V. Desgrand did not, within six calendar months next and immediately after the date of the said supposed letters-patent, cause any instrument in writing under his hand and seal, particularly describing the nature of the said invention, to be inrolled in Chancery.

The defendant delivered with his pleas, under the 5 &

(a) Before *Parke*, B., sitting alone.

6 Will. 4, c. 83, s. 5, the following (amongst other) notices of objections:—

That the said J. V. Desgrand did not, by the said specification, particularly and sufficiently describe and ascertain the nature of the said supposed invention, and in what manner the said supposed invention was and is to be performed.

That the said J. V. Desgrand has not caused any specification or instrument in writing, under his hand and seal, particularly and sufficiently describing and ascertaining the nature of the said supposed invention, and in what manner the same was and is to be performed, to be duly inrolled in the high Court of Chancery.

Bovill having obtained a rule, calling upon the defendant to shew cause why he should not deliver further and better particulars of his objections, or why the notice of objections already given should not be amended,

Hindmarch shewed cause.—The question is, whether the objections are sufficiently precise. The defendant contends that they are so. In *Heath v. Unwin* (a), the objection was in terms quite as general as the present, and yet it was held good. The second objection there was, “that the specification and disclaimer did not sufficiently describe the nature of the invention, and the manner in which it was to be performed.” And Lord *Abinger*, C. B., said, “Surely it is enough for the defendant to say that the specification does not properly set forth the invention. The Legislature never intended that the defendant should argue his case in the statement of objections which he delivers in compliance with the act.” [*Parke*, B.—You say, in the last objection, that Desgrand had not caused “any specification or instrument in writing, sufficiently describing

1845.
LEAF
v.
TOPHAM.

(a) 10 M. & W. 684.

1845.
LEAF
v.
TOPHAM.

the nature of the invention, to be inrolled." I should not know by that, whether you meant to say that there was no specification in writing, or that it did not sufficiently describe the invention. If you put in the word "other," I could understand it.] The notice may be double, but that is no objection to it, as the same particularity is not required as in a plea.

PARKE, B.—I think the meaning of the last objection is too obscure. It may either mean, that there is no specification existing among the rolls of the court, or that that which has been inrolled is defective in not sufficiently describing the invention. It is not necessary that the notice of objections should set out the evidence on which the defendant relies, but it ought to be more specific than this is. The act of Parliament which requires the notice of objections was framed at a time when the general issue was the usual plea in cases of this kind, and it was no doubt intended to pass in the place of special pleas (a). The defendant had better amend his last objection, by inserting the word "other," and stating that no *other* specification, &c. was duly inrolled in Chancery.

Rule absolute.

(a) 5 & 6 Will. 4, c. 83. See the note to *Fisher v. Dewick*, 6 Scott, 593; and *Jones v. Berger*, 6 Scott, N. R., 210.

1845.

BEARUP and Another v. PEACOCK.

May 7.

THIS was a rule calling upon the defendant to shew cause why an attachment should not issue against him for non-payment of money pursuant to an award and allocatur. This action, which was indebitatus assumpsit for work and labour, goods sold and delivered, money paid, money lent, and on an account stated, was, before pleaded, referred to arbitration by order of a Judge. The arbitrator, after reciting in his award that the action was brought to recover 38*l.* 9*s.* 11*d.* for work and labour, goods sold, and money expended and laid out for and lent to the defendant, proceeded to award as follows:—"I do award, adjudge, and determine that the said William Bearup and Mary Shevill had good cause of action against the said Thomas Peacock; and I do assess and award the damages to be paid by the said T. Peacock to the said William Bearup and Mary Shevill at the sum of 86*l.* 14*s.* 5*d.*" Against the above rule

Where a declaration contained several counts, and the cause was referred by order of a Judge before plea pleaded—*Held*, that the arbitrator was not bound to find specifically upon each count in the declaration, but might find generally that the plaintiff had good cause of action for a certain sum, and award that the defendant should pay him that sum.

Knowles now shewed cause.—The award is bad, inasmuch as the arbitrator has omitted to specify on which of the causes of action mentioned in the declaration he has found the money to be due. [*Parke*, B.—You are confined to the award itself, and cannot refer to the declaration, unless you have brought it before the Court upon affidavit.] Undoubtedly it was so held in *Rowe v. Sawyer* (a); but here it appears, by the recital in the award itself, that the action was brought for work and labour, goods sold, and money paid and lent, and therefore it sufficiently appears on the face of the award that the arbi-

(a) 7 Dowl. P. C. 691.

1845.
BEARUP
v.
PEACOCK.

trator has awarded on all the issues; and as the costs are to be assessed on all the counts, the award is not final.

PER CURIAM.—There is nothing on the face of the award to shew that any issue was raised on the counts in the declaration; and, for all that appears, the sum awarded might all have been recovered on one count only.

Rule absolute.

ON the following day, *Knowles* moved to set aside the award, on the ground of misconduct on the part of the arbitrator, and also that he had not disposed of all the matters referred to him in the cause.

PER CURIAM.—The defendant may take a rule on the first point, but we cannot grant it upon the other. The parties have referred the matters in difference in the action, but, until plea pleaded, we cannot tell what the issues are. It may be that the defendant did not dispute more than one part of the plaintiff's claim, and may have let judgment go by default as to the rest. There is no authority that an arbitrator is bound to decide upon each count of the declaration, where there is no plea.

Rule refused.

1845.

The Earl of STAMFORD and WARRINGTON v. DUNBAR.

May 8.

THE verdict in this case (which was a feigned issue delivered under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 46) having been found for the plaintiff, and sustained by the Court (*a*), a rule was afterwards obtained, calling upon the defendant to shew cause why the plaintiff should not be allowed the costs of the issue, under the 46th section of the act, which provides, that the costs of every action, and of stating every special case as thereinbefore provided, "shall be in the discretion of the Court in or by which the same shall be decided."

The successful party in an issue directed under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 46, is entitled to costs, unless he has been guilty of some misconduct or bad faith, or has succeeded partially only; and this although the commissioner had previously decided in favour of the other party.

Whitehurst now shewed cause.—A discretionary power as to the costs is no doubt vested in the Court by the statute, but it ought to be exercised by analogy to the practice in other cases. The 8 & 9 Will. 3, c. 11, s. 2, gives costs on a writ of error, when the judgment is affirmed or the writ of error discontinued; yet, where the judgment is reversed, no costs are given, because they arose from the error of the Court below. So, no costs are given when a new trial is directed for misdirection or mistake of the law by the Judge; nor when an order of a Judge, or of justices, is set aside. By analogy, therefore, no costs ought to be given against the defendant in this case, for though he was unsuccessful in the issue, the proceedings arose out of the mistake in law of the commissioner, who for this purpose exercises judicial functions, and must be considered in the light of a Judge.

Cowling, in support of the rule, stated that this question had come before the Court of Queen's Bench, during the present term, in two cases, in both of which costs had been

(a) 13 M. & W. 822.

1845.

Earl of
STAMFORD
v.
DUNBAR.

awarded to the party successful in the issue, although the proceedings were partly occasioned by an erroneous decision of the tithe commissioner in point of law. [*Rolfe*, B.—The principle on which the Court acted in those cases appears to have been, that *primâ facie* the successful party ought to have his costs, but that such *primâ facie* right might be rebutted by special circumstances. In truth, the question in the present case was not a question of law, but of fact, viz. whether a *modus decimandi* had existed from time immemorial.]

POLLOCK, C. B.—It does not appear that either of the cases in the Queen's Bench raised the question as to the allowance of costs, where the question to be determined in the issue was purely one of law. But, considering the whole subject, together with those cases, the rule which we are disposed to lay down with respect to the allowance of costs under this act is, that in all cases the successful party should have his costs, unless he has disentitled himself by some misconduct or bad faith from receiving them, or unless in cases where his success is partial only.

PARKE, B.—The question of costs is dependent on the practice of the courts, which in this respect is arbitrary and varying. Some tribunals indemnify the party ultimately successful, who has gone through several courts, for his costs in all. This is the rule in appeals from the East Indies, which is thus regulated by statute, on the principle that a man ought to be indemnified for all the costs he may have been put to in establishing his right.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute (*a*).

(*a*) The like question arose in *Savage*, (Trin. T., 1845, May 22), a subsequent case of *Stokes v.* in which a special case had been

1845.

VACATION SITTINGS AFTER EASTER TERM.

May 13.

APPELMANS v. BLANCHE.

The omission of the Christian names of persons mentioned in pleading (unless it be excused by averment) is ground of special demurrer.

A declaration in assumpsit stated, that the plaintiff and defendant had been partners in trade, and had dissolved partnership, and that a bill of exchange, drawn by the plaintiff upon and accepted by M., for £40, being a debt due from M. to the plaintiff and

defendant, had been lost by the plaintiff and defendant, with their indorsement in blank thereon; and thereupon, in consideration that the plaintiff delivered to the defendant another bill for £40, and four promissory notes for £20 each, for his share of the capital of the partnership, the defendant promised the plaintiff to bear the loss of half the amount that might not be paid in liquidation of the lost bill; provided, that in case of M.'s making any difficulty, the plaintiff should obtain the approval of Messrs. B. & G., the defendant's advocates, to any proceedings against M.; and that the defendant would deposit, when required by the plaintiff, £40 in the hands of a third party, in case such deposit should be found necessary to recover the said debt due by M. Averment, that it became necessary to deposit the £40, for the purpose of recovering the debt due from M., M. being ready to pay the debt if the £40 were deposited at the Bank of England, to indemnify him against the payment of the lost bill; and that the Bank were ready to receive and hold the money. Breach, that the defendant refused to make such deposit:—*Held*, on special demurrer, that the promise of the defendant was an absolute promise to deposit the £40 if necessary, and was not dependent on the approval of his advocates: and that a sufficient consideration for, and breach of, such promise were alleged in the declaration.

ASSUMPSIT.—The declaration stated, that, before making the promise thereafter mentioned, the plaintiff and the defendant had been co-partners in trade, which said partnership, just before the making of the said promise, to wit, on the 20th December, 1844, the plaintiff and the defendant had dissolved. And whereas, before the making of the said promise, a certain bill of exchange, drawn by the plaintiff upon and accepted by Marchand, for the payment to the order of the plaintiff of the sum of £40, being a debt due by the said Marchand to the plaintiff and the defendant, had been and was lost by the plaintiff and the defendant, with their indorsement in blank thereon, and at the time of the making of the said promise continued lost, and not found by them; and thereupon heretofore, to wit, on the day and year last aforesaid, in consideration that the plaintiff, at the request of the

defendant, then delivered to the defendant a bill of exchange in writing, drawn by Rowland upon and accepted by W. Oyeres, for the sum of £40, payable to the order of the said Rowland on the 25th day of February then next, and indorsed in blank by the said

Rowland, and then at the like request delivered to him four several promissory notes in writing, each made by the plaintiff, for the payment to the defendant or his order of the sum of £20, payable, one on the 1st day of July 1845, one other on the 1st day of January 1846, one other on the 1st day of July 1846, and the other on the 1st day of January 1847, being for and on account of the defendant's share of the capital of the said co-partnership, the defendant then promised the plaintiff to bear the loss of half the amount of the sum which might not be paid in liquidation of the said lost bill of exchange; provided, that, in case of the said

Marchand making any difficulty, the plaintiff should obtain the approval of Messrs. Bonville & Gadon, advocates to the defendant, to any proceedings taken against the said Marchand to obtain the payment of the whole or part of the said debt, and that the defendant would deposit (when and wheresoever it might be required by the plaintiff) the sum of £40 in the hands of a third party, in case such deposit should be found necessary to recover the said debt due by the said Marchand; but that the defendant should not, under any pretence, even if he should advance the sum of £40 to ensure the payment of the said debt due from the said Marchand, claim or receive the amount of the said debt, because the sum of £80, in which the plaintiff was indebted to the defendant, had been settled by the said four promissory notes. And the plaintiff avers, that, after the making the said promise, to wit, on the day and year aforesaid, it did become and was found to be necessary to deposit the sum of £40 in the hands of a third party, for the purpose of recovering the said debt due from the said Marchand, in this, to wit,

1845.

APPELMANS
v.
BLANCHE.

1845.
APPELMANS
v.
BLANCHE.

that the said Marchand was then ready and willing and then offered the plaintiff to pay to him the said debt of £40, if that sum of £40 was deposited in the Bank of England, in the names of the Governor and Company of the Bank of England, to indemnify him against payment of the said lost bill of exchange; and the Governor and Company of the Bank of England were then ready and willing to accept, receive, and hold the said sum of £40 on the terms aforesaid; of all which the defendant had then due notice, and was then requested by the plaintiff to deposit the sum of £40 in the Bank of England, in the names of the said Governor and Company of the Bank of England, for the purpose aforesaid, on or before the sixth day of January instant, the same then being a reasonable time in that behalf; and although the said time had elapsed before the commencement of this suit, yet the defendant disregarded his promise, and did not nor would deposit the said sum of £40, or any part thereof, in the said Bank of England, in the names of the Governor and Company of the Bank of England, but wholly neglected and refused so to do; by means of which premises the plaintiff has been wholly prevented from obtaining payment from the said

Marchand of the said debt of £40, or any part thereof, which he might and otherwise would have obtained. And the plaintiff avers, that the said bill of exchange for £40 hath always hitherto remained and still is lost and not found, and the said debt of £40 is still due and unpaid.

Special demurrer, assigning for causes, that the said declaration does not contain any sufficient averment that it was found to be or in fact was necessary for the recovery of the said debt therein mentioned to be due by the said

Marchand, that the defendant should deposit the sum of £40, or that the defendant had become or was liable, under or by virtue of his promise, as stated in the declaration, to make any such deposit: that it is not alleged in the declaration, that the said Marchand was unwilling

1845.

APPELMANS
v.
BLANCHE.

or unable, or had refused to pay, or was not by law bound to pay, or could not be compelled to pay, the said debt due from him, unless the defendant made the deposit mentioned in the declaration: that it is not averred that the plaintiff obtained the approval of the said Messrs. Bonville & Gadon, named in the declaration, to the proceedings taken against the said Marchand, although it appears by the declaration that the said Marchand did make difficulty in paying the said debt due from him: that there is no sufficient consideration set forth in the declaration for the promise therein alleged to have been made by the defendant: that the delivery of four promissory notes, severally made by plaintiff, together with a certain bill of exchange, is stated in the declaration to be the consideration for the alleged promise of the defendant, whereas in another part of the said declaration it appears that the same four promissory notes were delivered by the plaintiff to the defendant in settlement of a just debt admitted to be due from the plaintiff to the defendant, and therefore the same could form no part of the consideration made by the defendant to the plaintiff: that by reason of blanks and void spaces being left in the declaration for the Christian names of persons therein named, (to wit), Marchand, Rowland, and W. Oyeres, the said declaration is rendered so uncertain, that the defendant is unable to judge what pleas he could safely and properly plead thereto, and that the said blanks and void spaces so left are not such as are authorized or warranted by law or the rules of pleading: that the breach of promise assigned in the declaration is too extensive, and charges the defendant with what he was not bound to do, (that is to say), with omitting to deposit the sum of £40 in the Bank of England, in the names of the Governor and Company of the Bank of England; whereas the defendant's promise, as alleged in the declaration, is only to deposit in the hands of a third party the said sum, and not to make such deposit in the name or names of

1845.
 }
 APPELMANS
 v.
 BLANCHE.

any particular person or persons, or such only as should be named by the plaintiff: that it is averred in the declaration that the said Governor and Company of the Bank of England were ready and willing to accept, receive, and hold the said sum of £40, on the terms aforesaid; but it is not stated in the declaration, nor can it be inferred or collected therefrom, what such terms were, or that they were such as the defendant was bound to accept or agree to, or deposit the said sum of £40 upon, &c.—Joinder in demurrer.

Corrie, in support of the demurrer.—This declaration is bad on several grounds. First, it does not sufficiently appear what is the promise alleged; whether it is that the defendant was to make the deposit of £40 upon the mere requisition of the plaintiff, in case it should be found necessary in order to the recovery of the debt due from *Marchand*, or whether the obtaining the consent of the advocates to that proceeding is not an ingredient in the promise. [*Parke*, B.—It is to legal proceedings against *Marchand* that their consent is necessary: but the defendant enters into an absolute promise to deposit the money, if it should be found necessary to recover the debt; and it is averred that it was found necessary.] No proceedings are to be taken against *Marchand*, unless with the consent of the advocates; and the deposit is necessary only in case of proceedings being taken to recover the debt from him. [*Parke*, B.—If he will pay, well and good; if not, no proceedings are to be taken against him without the consent of the advocates; but if the debt cannot be recovered without the defendant's making the deposit, then the defendant agrees that he will make the deposit. *Alderson*, B.—The word "recover" does not here mean, necessarily, recover by law.]

Secondly, the breach is insufficient. The deposit is to be made only to recover the debt; and it is not alleged

that the deposit was necessary for that purpose, except sub modo, namely, that Marchand was willing to pay the debt, in case the £40 were deposited with the Bank of England, to indemnify him against the payment of the lost bill. Suppose the plaintiff could have shewn that the bill was absolutely destroyed; he might then recover the debt. [*Parke*, B.—Not unless the party was indemnified: *Hansard v. Robinson* (a).] It is not alleged that Marchand would *not* pay without the deposit being made, or that the plaintiff could not recover the debt without it.

Thirdly, the declaration should have shewn that the Governor and Company of the Bank of England were assented to by the defendant as deposites of the money, or, at all events, that they were fit and proper persons to receive it. The defendant does not contract to deposit in the hands of any third party whom the plaintiff alone may choose to nominate.

Lastly, the declaration is bad on special demurrer, by reason of the blanks left for the Christian names of the parties. No reason or excuse is shewn on the face of the declaration for leaving out part of the names, and without it the omission is cause of demurrer: *Stephen* on Pleading, 329, (4th edit.) It is not like the case of a bill drawn or accepted by partners in the name of the firm, in which case they may be so described in the declaration; *Ball v. Gordon* (b), *Tigar v. Gordon* (c); but the general rule of the common law is, that the Christian and surname of all persons mentioned in the pleadings must be accurately set out.

Peacock, contra.—The first objection made to the declaration is without foundation. It is not in order to the recovery *by law* that the deposit of money is to be made by the defendant. [*Alderson*, B.—No; the word “re-

(a) 7 B. & C. 90; 9 D. & R. 860. (a) 9 M. & W. 345.

(c) *Id.* 347.

1845.
APPELMANS
v.
BLANCHE.

cover" is there equivalent to "obtain.]" Secondly, the breach is sufficient: it is averred that the bill has always remained lost, and therefore Marchand was clearly entitled to withhold payment without an indemnity. [*Parke, B.*—What do you say to the objection as to the defect in the names?] A man has not necessarily any Christian name at all. [*Parke, B.*—Then ought you not to state that?] It is an objection *strictissimi juris*, and, in support of the declaration, the Court will assume that the party has no more names than one.

PARKE, B.—If you had declared upon it as a written engagement, and had described the party as "a certain person mentioned in the said writing as Marchand," it might have been sufficient; but, as it is, the declaration is defective, unless you can in every case leave out the Christian names of the persons mentioned in the pleading. There is a special provision in the 3 & 4 Will. 4, c. 42, as to bills of exchange, but that applies only to the names of the parties to the suit. You must amend.

The other Barons concurred.

Leave to the plaintiff to amend, on payment of costs, otherwise

Judgment for the defendant.

1845.

May 13.

DAVIES v. JOHN THOMSON.

ASSUMPSIT on a bill of exchange for £40, dated 2nd August, 1844, drawn by E. Martin upon and accepted by John Wontner, payable four months after date, indorsed by E. Martin to the defendant, and by him, by the name, style, and firm of Thomson Brothers, to the plaintiff. There was also a count on an account stated.

A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the declaration, and that the same may be quashed, is informal; it ought to pray judgment of the writ and declaration.

Plea in abatement, praying judgment of *the declaration*, on the ground that the premises in the declaration mentioned were made by the defendant jointly with Alexander Elmaley Thomson, who is still living, and resident within the jurisdiction, &c. The plea concluded thus:—"Wherefore, inasmuch as the said A. E. Thomson is not named in the said declaration together with the defendant, he the defendant prays judgment of the said declaration, and that the same may be quashed."

Special demurrer, assigning for causes, that the commencement and conclusion of the said plea are altogether informal, and contrary to the established rules of good pleading; that in the commencement of the said plea the defendant prays judgment of the said declaration, and in the conclusion of the said plea prays judgment of the said declaration, and that the same may be quashed; that the said commencement and conclusion are bad and unintelligible; that it is impossible for the Court, on such a prayer, to deliver any judgment whatever; that, by the rules of pleading, the defendant should have prayed, either judgment of the writ, *quod cassetur breve*, or judgment of both writ and declaration, *quod cassetur breve et narratio*; that a mere prayer of judgment of the declaration only cannot, under any circumstances, be granted in abatement, because there can be no valid judgment corresponding with such prayer; that, in order to make the prayer of judgment effectual or regular, it must be of the writ, in

1845.
 DAVIES
 v.
 THOMSON.

part or in whole; that, upon the present plea, the plaintiff is prevented, if he were so disposed, from entering a *cassetur breve*; that, inasmuch as the plea admits the writ, whereon the declaration is founded, to be good and regular, the declaration so founded thereon can be only defective on the ground of a variance from the writ, and that such supposed variance is no matter of plea in abatement, &c. Joinder in demurrer.

Peacock, in support of the demurrer.—The plea is bad, for the reasons assigned as causes of demurrer. It ought to have prayed that the writ, as well as the declaration, may be quashed. [*Parke*, B.—That is the form given by Mr. Chitty (a): but the question is, whether the plea must be in abatement of the writ, since the Uniformity of Process Act; because now the writ is merely process to compel appearance.] The object of the plea in abatement is to give a *better writ*. The new form of process makes no difference in this respect. Formerly, where the action was commenced by bill, the prayer of the plea in abatement was to quash the bill, which was in effect the declaration; but in the case of an action commenced by original writ, it was necessary to pray that the writ might be quashed: *Duppa v. Mayo* (b). If the object be, as it is, to give a better writ, the plea should pray that the writ be quashed; and the judgment is, “quod cassetur billa vel breve;” the bill where the action was so commenced, or the writ where it was not. [*Parke*, B.—Mr. Stephen speaks (pp. 49, 431) of the plea as giving a better writ or declaration. It is now no ground for setting aside the declaration, that it varies from the writ as to the number of the defendants, so that the writ may be perfectly right.] What would be the judgment on this plea? [*Parke*, B.—That the declaration be quashed.] No such judgment is known to

(a) 3 Chit. Pl. 714, 6th edit.

(b) 1 Saund. 284, n. (4).

the law; for "*cassetur billa*" means the quashing of the *bill*, which was the first process. [*Parke*, B.—But since the Uniformity of Process Act, you cannot quash the writ on this ground, because you do not know that it is not correct; therefore you must quash the declaration. *Rolfe*, B.—What is there to shew the writ was not against both these persons?] If the plaintiff sues out a writ against two, intending to go on against one of them only, that would be a ground for quashing the writ. At all events, the plea should aver that the writ was against both, so as to shew that the declaration only ought to be quashed. [*Parke*, B.—The defendant cannot have oyer of the writ; how then is he to aver it?] The Court will presume that the declaration follows the writ, until the contrary be shewn. In *Attwood v. Davis* (*a*), where the proceedings were *by bill*, in assumpsit, and the defendant pleaded in abatement the non-joinder of a co-contractor, and prayed judgment "of the said writ, and of the declaration founded thereon," the plea was held bad on demurrer. All the old authorities, in Comyns' Digest (*b*) and other books, make the plea pray judgment of the writ and declaration. [*Parke*, B.—That is where there is a fault in both; but now the writ and declaration need not agree, except in the form of action.] It was the same before the Uniformity of Process Act; you might join several in the writ and declare against one only. Suppose the Court quashed the declaration; the writ would then remain against one, but the plaintiff could not declare on it against the two. And if he issued a fresh writ against the two, they might plead in abatement the pending writ against one. As soon as the plaintiff, by his declaration, elects to treat it as a writ against one only, the defendant, pleading in abatement, should pray that that writ may be quashed; then the plaintiff would have a new writ, and

1845.
 DAVIES
 v.
 THOMSON.

(*a*) 1 B. & Ald. 172.

(*b*) Com. Dig., Abatement, (I. 12), 2.

1845.
 DAVIES
 v.
 THOMSON.

declare upon it properly against both, and so he would obtain a *better writ*. [*Parke, B.*—Giving a better writ merely means giving a better commencement of the action;—it is a mere general expression.] Mr. Chitty (*a*), in his precedent, still follows the old form; and, in 2 Saund. 209, n. (1), it is laid down, that, although the plea in abatement be founded on some extrinsic matter out of the writ, as non-joinder, still it must conclude with praying judgment *of the writ*.

Jervis, contra.—The old authorities on this subject are not now applicable. Supposing the writ right, and the declaration wrong, how otherwise is it to be taken advantage of? The defendant cannot have oyer of the writ; he has, therefore, no other mode of getting rid of the suit, except by praying judgment of the declaration; unless, indeed, as is suggested on the other side, the plaintiff, by declaring against one only, has made it a *writ* against one only, and so the defendant may quash it; but that cannot be so. It has been said, what is to be the judgment upon this plea? The answer is, according to the prayer. The like difficulty in that respect would always have arisen under the old form, where the prayer was to quash the writ *and* declaration, for a defect extrinsic of the declaration. In *Herries v. Jamieson* (*a*), the writ was in debt for £1066, and the plaintiff declared, in one count, for £1000 money lent, and in another for £66 for interest on a certain other sum of money; and the defendant pleaded in abatement, and prayed judgment *of the writ*, on the ground that “the said sum of money in the said writ mentioned, and thereby supposed to be *borrowed* from the plaintiff,” was borrowed of him by the defendant and five others; and there was a demurrer, on the ground, amongst others, that the defendant had not pleaded in abatement

(*a*) 3 Chit. Pl. 714.

(*b*) 5 T. R. 553.

of the *declaration*, but in abatement of the writ merely, and had nevertheless relied upon matter appearing only in the declaration, without shewing any defect in the writ. The Court decided the case for the plaintiff on another ground, namely, that the plea answered only one of the causes of action, viz. that mentioned in the first count; but they clearly appear to have considered this as a defect in the *declaration*. If the writ be in fact against both, this plea would support instead of abating it. The operation of the writ is not spent by the plaintiff's having declared upon it against one of the parties only: why may he not afterwards declare upon it against the two? [*Parke*, B.—To make all the practice consistent, we must understand the declaration as being an election to explain the generality of the writ; as in *Herries v. Jamieson*, where the writ was in debt for £1066, and the declaration for £1000 money lent in one count, and for £66 interest in another. So here, the plaintiff having, by his declaration, narrowed the operation of the writ, and declared it to be a writ against one only, the defendant ought to set aside the whole proceeding. We must consider the other name, if it was there, as having been struck out of the writ—like the old John Doe.] That is founded upon the supposition that the plaintiff may still declare against the other party; but he cannot successfully do so. In *Lee v. Barnes* (a), it is said by *Holt*, C. J., that a defendant may plead in abatement of the declaration where the action is by original; but if the action is by bill, he cannot plead in abatement of the declaration, but only of the bill, for they are the same thing. The commencement of the suit is still by the writ; and the object of the plea is to give a better suit. [*Alderson*, B., referred to *Leaves v. Bernard* (b).]

1845.
 DAVIES
 v.
 THOMSON.

PARKE, B.—It seems to me that the only way of reconciling the apparent anomalies introduced by the new statute

(a) 5 Mod. 144; Holt, 3.

(b) 12 Mod. 133.

1845.
 }
 DAVIES
 v.
 THOMSON.

is, by supposing the declaration as conclusively explaining and narrowing the operation of the writ, and therefore that the plea in abatement should pray judgment of the writ, and consequently is bad in its present form.

ALDERSON, B.—There can be no doubt that is the more convenient decision.

ROLFE, B., concurred.

Judgment for the plaintiff.

May 13. HUGH WILLIAMS and ANN his Wife v. JOHN WATERS,
 Executor of JOSEPH WATERS.

By lease and release, by way of marriage settlement, lands, the inheritance of the wife, were conveyed by her to trustees and their heirs, to the use of the wife and her assigns, until the marriage; and from the solemnization of the marriage, in trust for the wife and her assigns, during her life, for her own sole and separate use, independent of the debts, control, or engagements of the husband; and from her decease, to the use of the husband, his heirs and assigns:—*Held*, that the trustees did not take the legal estate during the life of the wife, but that the use was executed in her, notwithstanding the words “to her own sole and separate use,” &c.

COVENANT on an indenture of lease, dated 26th June, 1819, made between the plaintiff Ann, dum sola, and the defendant's testator, Joseph Waters, whereby she demised to the said Joseph Waters a messuage and lands therein *mentioned*, for ninety-nine years, yielding and paying (inter alia) the *yearly* rent or sum of 164*l.* 9*s.* during the life of the said Ann, by two equal half-yearly payments, on the 25th March and 29th September in every year; and the said Joseph Waters, for himself, his executors, administrators, and assigns, covenanted with the said Ann and her assigns for payment of the said yearly rent of 164*l.* 9*s.*, on the days and times thereinbefore mentioned for payment thereof. The declaration then averred the entry and possession of the testator, and assigned as breaches the non-payment by the defendant as executor, after the death of the said Joseph Waters, and after the intermarriage of the plaintiffs, of the sum of 14*l.* 9*s.*, parcel of a half-yearly



payment of the said rent due at Michaelmas, 1841; of the further sum of 82*l.* 4*l.* 6*d.*, being the half-yearly payment due at Lady-day, 1842; and of three other like sums, being the half-yearly payments respectively due at Michaelmas, 1842, and at Lady-day and Michaelmas, 1843, (amounting in the whole to 343*l.* 7*s.*).

1845.
WILLIAMS
v.
WATERS.

The defendant pleaded, that, after the making of the indenture in the declaration mentioned, and before the marriage of the said Ann with the said Hugh Williams, and before the accruing of any of the causes of action in the declaration mentioned, to wit, on the 3rd of June, 1832, she the said Ann was seised in her demesne as of fee of and in the reversion of and in the said messuage, lands, and premises, with the appurtenances in the declaration mentioned, expectant on the said term so granted to the said Joseph Waters. The plea then set out indentures of lease and release, (being the settlement made on the marriage of the plaintiffs), dated respectively the 3rd and 4th of June, 1832, the latter made between the said Hugh Williams of the first part, the said Ann of the second part, and Walter Rice Howell and John Williams of the third part, whereby the said Ann, for the considerations therein mentioned, granted, bargained, sold, released, and confirmed the said messuage, lands, and premises, with the appurtenances in the declaration mentioned, to the said W. R. Howell and John Williams and their heirs, to the use of the said Ann, her heirs and assigns, until her marriage, and after the solemnization thereof, *in trust for* the said Ann and her assigns for her life, for her own sole and separate use, independent of the said Hugh Williams, her intended husband, his debts, control, or enjoyment; and from and after the decease of the said Ann, to the use of the said Hugh Williams, his heirs and assigns, for ever. Averment, that after the execution of the said indenture, and before the committing of any of the breaches of covenant in the declaration mentioned, the marriage

1845.
WILLIAMS
v.
WATERS.

between the said Hugh Williams and the said Ann was duly had and solemnized, to wit, on &c. ; and that the said Ann is, and at the time of committing the said breaches of covenant was, in full life; and that after the making of the said indenture, and after the marriage of the said Ann as aforesaid, and before the commencement of this action, to wit, on &c., the said W. R. Howell died, and the said John Williams survived him, and has ever since continued to be, and at the commencement of this suit was, in full life. —Verification.

Special demurrer, assigning for causes, that, according to the terms of the deed, as set out in the plea, the trust, use, or confidence vested in the plaintiff Ann upon her marriage, and therefore that the legal estate vested in her upon her marriage, and did not remain or vest in the said W. R. Howell and John Williams, or either of them : and also, that, if the defendant means to contend that after the marriage the legal estate vested in the releasees to uses, he ought to have pleaded the legal effect of the deed accordingly, and ought not to have stated the legal effect to be, that after the marriage the estate was to be in trust for the said Ann and her assigns for her life, for her own sole and separate use : and also, that the plea is ambiguous, and it does not sufficiently appear whether it is intended to allege that the release created a legal estate in the releasees after the marriage, or a legal estate in the plaintiff Ann : and also, that the deed ought to have been pleaded according to its legal effect, in this, that it should have been pleaded as a release, or as a grant, according to the mode in which the defendant intends to say that it operates, and should not have been pleaded as both, as is done by the use of both the words grant and release : and also, that the said plea is double, in this, that it alleges that the plaintiff Ann granted, and that she released, whereas it would have been sufficient to have pleaded that she granted or that she released, &c. : and also, that there

is no allegation that either John Williams or W. R. Howell ever accepted the estate, or that they, or either of them, ever became seised of the reversion.—Joinder in demurrer.

The plaintiffs also stated the following points for argument:—

The plaintiffs will contend, first, that the legal estate did not vest in the releasees to uses; secondly, that even if it did so vest, yet the original reversioner may sue on the covenant, at least until the assignee of the reversion has sued; and thirdly, they will rely on the special objections to the form of the plea raised by the demurrer.

The defendant stated the following points:—

The defendant will contend that the plea is good, and sufficiently pleaded; and that the declaration is bad, for declaring as for rent reserved payable half-yearly, whereas it appears on the record to have been reserved payable yearly; and that each breach is bad for assigning the non-payment of a rent described as payable half-yearly, or that at all events the alternate breaches are bad for that reason; that every breach is bad for that reason, which assigns a non-payment on the 25th day of March, or otherwise than on the 29th day of September.

E. V. Williams, in support of the demurrer, was stopped by the Court, who called upon

J. W. Smith, contra.—The question in this case is one depending upon the construction and operation of the Statute of Uses, 27 Hen. 8, c. 10; viz. whether the release by the plaintiff Ann to the trustees of her marriage settlement created a *use* in them during her life, or merely a *trust*. The defendant contends that it is a special trust, not a *use* executed in her, inasmuch as it involves an object which cannot be carried into effect without the trustees having the legal fee, namely, the payment of the rents and profits to her sole and separate use during the

1845.
WILLIAMS
v.
WATERS.

1845.
WILLIAMS
v.
WATERS.

coverture. The wording and intent of the deed shew that it is a special trust, and not an executed use. The true test is, had or had not the releasees any duty imposed upon them, to the discharge of which their personal interference would be necessary? The cases on this subject are collected in the note (17), 2 Saund. 11. In *Nevil v. Saunders* (a), where lands were devised to trustees and their heirs, in trust for A., a married woman, and her heirs, and that the trustees should from time to time pay the rents and profits to A., or to such person as she, by any writing under her hand, as well during coverture as being sole, should appoint, without the intermeddling of her husband, who the testator willed should have no benefit or disposal thereof; and, as to the inheritance of the premises, in trust for such person and for such estates as A., by her will, or by writing under her hand, should appoint, and for want of such appointment, in trust for her and her heirs; it was held, that this was a trust for the wife only, and not a use executed by the statute. So, in *Hartton v. Harton* (b), where a devise was to trustees and their heirs, upon trust to permit a married woman to receive the rents and profits during her life for her own sole and separate use, notwithstanding her coverture, and without being subject to the debts or control of her husband, and her receipt alone to be a sufficient discharge, with remainder over, it was held, that the legal estate was vested in the trustees; for, it being the intention of the testator to secure to the wife a separate allowance, free from the control of her husband, it was essentially necessary that the trustees should take the estate with the use executed, in order to effectuate that intention, otherwise the husband would be entitled to receive the profits, and defeat the very object which the testator had in view. The reasoning of that case applies here. So, where there was a de-

(a) 1 Vern. 415.

(b) 7 T. R. 652.

1845.
 WILLIAMS
 v.
 WATERS.

to get rid of the effect of the statute, by an implication that the parties in this case did not *intend* the deed so to operate; but that is no reason against its so operating; the parties cannot override the statute. Suppose they had declared in terms that it was their intention that the Statute of Uses should not operate upon this estate; it would operate nevertheless. If the parties could not directly prevent the application of the statute, neither can they do so indirectly. With respect to a *will*, no doubt the established distinction is, that if it be a trust to *pay over* the rents and profits, the statute will not execute it; if it be a trust to *permit and suffer* the party to receive them, it will. But there is no authority for any such distinction as to a *deed*. The parties cannot, *at law*, control the operation of the statute, by creating a separate use for the wife, which is a violation of the law. Suppose there were a limitation in a deed to A. and his heirs, in trust for B. and his heirs, but B. shall not cut down trees; the latter restriction would be utterly void. Besides, here there is no function whatever to be performed by the trustees. [*Parke, B.*—I cannot help thinking these words would have given the trustees the legal estate in a will.] There is considerable question whether the Statute of Uses operates on a will at all (*a*). But at all events, a totally different question arises in the construction of a *deed*, as to which the statute must operate, and the Court cannot look to the intention of the parties, unless it be expressed in a manner defined by the law. There is, however, no case to be found, even of a will, where the use was not executed, unless where there was some active function to be discharged by the trustee. [*Parke, B.*, referred to *Doe v. Barthrop* (*b*). *Rolfe, B.*—In *Harton v. Harton*, the receipt of the wife was to be a suffi-

(*a*) See the argument of Mr. Hodgson in *Doe d. Daniell v. Woodroffe*, 10 M. & W. 626; Co. Litt. 271. b., note 231; 1 Nev. & M. 175, note; Burton's Compendium of the Law of Real Property, 123.
 (*b*) 5 Taunt. 382.

cient discharge, i. e. to the trustees; which necessarily implies that they were to receive.] *Broughton v. Langley* (a) is an authority to shew that, even in a will, this would have been a use executed in the wife; for it would have been a plain trust at common law. Then the addition of the words "to her sole and separate use," &c., cannot prevent the use from being executed, because that is a purpose which the law does not allow. There is no authority that merely from the use of this clause, even in a will, a legal estate in the trustees can be implied; still less in a deed, where, even if the intention appears, the Court cannot give effect to it, unless it be expressed in terms to which the law gives effect: see per *Heath, J.*, in *Blaker v. Anscombe* (b). [He was then stopped by the Court.]

1845.
WILLIAMS
v.
WATERS.

PARKE, B.—Although no doubt it is highly probable that these parties intended to give the trustees the legal estate during the life of the wife, they have not used apt words for that purpose. We cannot collect clearly from the words of the deed, that they intended to give the trustees an *active trust*—to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife, although the husband is a trustee for her in equity.

ALDERSON, B.—I am of the same opinion. This case is within the very words of the Statute of Uses: "that where any person or persons shall stand or be seised of and in any lands, &c., to the *use, confidence, or trust* of any other person or persons, &c., by reason of any bargain, sale, &c., in every such case, all and every such person or

(a) 2 Ld. Raym. 873; 2 Salk. 679; 1 Lutw. 814, 823.

(b) 1 N. R. 25.

1845.
WILLIAMS
v.
WATERS.

persons &c., that have or hereafter shall have such use, confidence, or trust, in fee simple, &c., shall from henceforth stand and be seised, and deemed and adjudged in lawful seisin, estate, and possession of and in the same lands &c. of and in such like estates as they had or shall have in use, trust, or confidence of or in the same," &c. This is clearly an estate in the trustees for the use of another, that is, the wife; and it is not less so because it is clogged with a condition which is inoperative at law. In cases of what are called active trusts, it is a use given to the trustees themselves, on which a use cannot be executed by the statute.

ROLFE, B.—I am of the same opinion. It is no more than if the parties intended to clog the estate with any other condition contrary to law; as that the cestui que use should not alien, or that the estate should not be liable to his debts. It is said we are to construe the deed otherwise, because so the *intention* of the parties will be effected; but so it may in other ways; it will now, by the interposition of a court of equity; whereas, by our decision, we carry into effect the plain object of the settlor after the death of the husband.

Judgment for the plaintiff.

END OF EASTER VACATION.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

TRINITY TERM, 8 VICTORIÆ.

1845.

In re COBBETT.

May 22.

WILLIAM COBBETT, having been originally committed for a contempt, in not putting in an answer to a bill filed in a cause of *Oldfield v. Cobbett*, on the equity side of this Court, was afterwards detained in custody by order of the Court of Chancery, into which the cause had been removed when the jurisdiction of the Equity Exchequer was abolished, and the suits pending therein transferred to the Court of Chancery. The defendant, in Easter Term last, obtained from this Court a rule for a writ of habeas corpus ad subjiciendum; the Court directing that notice of it should be given to the plaintiff in the cause, who, on the return of the writ, appeared to oppose his discharge, and he was remanded to his former custody, with costs to be paid by him to the plaintiff. A rule having been obtained to rescind the latter part of the former rule, on the ground

Where a party, being in custody for contempt for not putting in an answer to a bill in equity, applied to the Court for a writ of habeas corpus ad subjiciendum, and the Court granted the writ, and directed notice thereof to be given to the plaintiff in the cause, who, upon the return of the writ, opposed the prisoner's discharge, and he was remanded to his former custody, the Court has no authority to give the plaintiff costs.

custody:—*Held*, that the Court had no authority to give the plaintiff costs.

1845.
 In re
 COBBETT.

that the Court had no authority to award costs in such a case,

Martin now shewed cause.—The Court has power to give costs to every person who is brought before it by rule to resist an application made to it, and there is nothing to take the case of a habeas corpus out of the general rule of practice. The authority of the Court arises from its general control over the matter brought before it. It can never be said that, where a party applies to be brought up by habeas corpus to be discharged, and the Court decides that there is no ground for the application, they cannot give costs to the party who is forced to come here to resist the application. [*Rolfe*, B.—You were not *bound* to come here. The Court might have decided for itself, on inspection of the warrant, whether the party was entitled to be discharged; but, seeing that you were interested in the matter, they directed that notice should be given you of the issuing of the writ.]

Pashley, in support of the rule.—This is not the case of a rule calling upon the party to shew cause why a writ of habeas corpus should not issue, where the Court might, if they please, allow costs; but it is a writ issued absolutely, with notice to a party supposed to be interested. The Court of Queen's Bench never allows costs in such cases.

PER CURIAM.—We must follow the practice of the Court of Queen's Bench in this respect, and we will send to ascertain what that is.

ALDERSON, B., afterwards said—The Masters of the Court of Queen's Bench inform us, that costs are never given in such cases. Then the rule must be absolute.

Rule absolute.

1845.

BIRT v. LEIGH.

May 24.

DEBT for work, labour, and materials, and for money due upon an account stated.

Plea, payment before action brought, in full satisfaction and discharge of all the causes of action in the declaration mentioned, which payment the plaintiff accepted in such full satisfaction and discharge as aforesaid.

The replication traversed the payment and acceptance, whereupon issue was joined.

At the trial before *Pollock*, C. B., at the Middlesex sittings in last Michaelmas Term, it appeared that the action was brought to recover the sum of 29*l.* 6*s.*, the balance of an account for plasterer's work done by the plaintiff for the defendant, at two houses in the Wellington Road, St. John's Wood. The defendant's counsel claimed the right to begin, which the Lord Chief Baron decided, on the authority of *Cooper v. Wakley* (a), he had the right to do upon this issue. It appeared that the plaintiff, in doing the work in question, required to be paid money from time to time, generally weekly, on account of the work done, and payments were accordingly so made, in sums varying from £2 to £4, as those amounts respectively became due, and receipts were given for the money so paid. The following receipt, from the plaintiff to the defendant, was given when the work was completed, which the defendant's counsel tendered in evidence as an answer to the action:—

"1843, July 8. Received of Mr. G. Leigh the sum of 2*l.* 2*s.*, being the balance of account up to this day, for houses in Wellington Road.

"WM. BIRT."

The defendant having employed the plaintiff to do some plasterer's work for him, the latter required the former to pay him money on account for it weekly, as the work was done, which the defendant accordingly did, and receipts were given for the amount so paid. And the following receipt was given by the plaintiff to the defendant when the work was completed:—
"1843. July 8. Received of Mr. G. L., the sum of 2*l.* 2*s.*, being the balance of account up to this day, for houses in Wellington-road."
—*Held*, that this was an acknowledgment of a sum therein mentioned, being received in satisfaction of a debt, whereof the amount is not specified, within the meaning of the clause in the schedule as to receipts in the Stamp Act, 55 Geo. 3, c. 184, which requires a 10*s.* stamp.

(a) 3 C. & P. 474; Moo. & M. 248.

1845.

BIRT
v.
LEIGH.

This receipt, which was not stamped, was objected to by the plaintiff's counsel, on the ground that it ought to have borne a 10*s.* stamp, as being an acknowledgment of money expressed to be received *in full* of a debt, whereof the amount was not specified, within the meaning of the words in the general clause at the end of the schedule as to receipts, in the Stamp Act, 55 Geo. 3, c. 184. The defendant's counsel contended that it did not require such a stamp, relying upon *Dibdin v. Morris (a)*. The Lord Chief Baron said he should admit the receipt in evidence, giving the plaintiff leave to move to enter a verdict for such sum as the Court should think proper. The jury having, under the direction of his Lordship, found a verdict for the defendant,

Knowles, in Michaelmas Term last, obtained a rule accordingly, against which

Crowder and *Rawlinson* now shewed cause.—The receipt in question did not require a stamp. The general clause to the schedule, title "Receipts," is as follows:—"And any receipt or discharge, &c. given to any person for or upon the payment of money, which shall contain, import, or signify any *general* acknowledgment of any debt, account, claim, or demand, *whereof the amount shall not be therein specified*, having been paid, settled, balanced, or otherwise discharged or ratified, or whereby any sum of money therein mentioned shall be acknowledged to be received *in full*, or in discharge or satisfaction of any such debt, &c., shall be deemed and taken to be a receipt for the sum of £1000 or upwards, within the meaning of this schedule, and shall be charged with the duty of 10*s.* accordingly." Now this is not such a receipt as is there described. It is not a receipt for an amount *not therein specified*, for it is a receipt

(a) 2 C. & P. 44.

for two guineas, nor does it acknowledge it to be received *in full* of any debt; it is merely a receipt for "the sum of 2*l.* 2*s.*, being the *balance of account* up to this day." The case of *Dibdin v. Morris* is expressly in point. There a receipt given by the stage manager of a theatre for 52*l.* 10*s.*, "in satisfaction of all my claims for the last season;" was held, by *Abbott*, C. J., not to require the stamp of a receipt in full of all demands. [*Pollock*, C. B.—The clauses in the Stamp Act, on which the plaintiff relies, were not adverted to in that case; and Lord Chief Justice *Abbott* decided it on the ground that it was "not a receipt in full of all demands." The clause in the act, as to its being "received in full of any debt," was not adverted to in that case.] That probably was because it was thought it did not apply. [*Pollock*, C. B.—It is clear that the public did not know, or even the Profession scarcely, owing to the decision in *Dibdin v. Morris*, that there were any such clauses. If it were as you contend, any person might evade the act by paying £1000, when the debt was £1004, and then afterwards paying the remaining £4, and taking a receipt for it on plain paper as the balance of the account. *Alderson*, B.—Such a receipt implies that something else has been paid.] It does not imply that a larger sum has been paid and then a small sum as the balance. There was no debt of which this was the *balance*, for the respective sums due for work, varying in amount from £2 to £4, were paid weekly as the work was done. Therefore there was no debt of a larger amount ever due, of which this could be said to be the balance. [*Alderson*, B.—My difficulty is this: that this receipt is evidence of those sums having been paid.] Although it may be some evidence of their having been paid, yet it does not refer to the other sums, and other receipts were given for them as they were paid. Unless it is shewn that there was an existing debt of a larger amount, of which this was the remaining balance,

1845.

BIR
v.
LEIGH.

1845.

BIRT
v.
LEIGH.

it is not within the act : but there is nothing to shew that there was anything more due than this sum of two guineas, for which the receipt was given. [*Alderson*, B.—That might be so, if you confined yourself to the two guineas, but you do not. You make it amount to a receipt for everything that is due.] Although it was, no doubt, used to shew that no more was due, it does not necessarily contain a discharge for anything more than the sum mentioned in it. Can it be said that the “balance of account” is a portion of that which has been paid? [*Pollock*, C. B.—The reason that it was called a balance was, that sums of money, sometimes more and sometimes less, were paid at different times, and receipts were taken for them ; but on this occasion you took a receipt for two guineas, being the balance of account. *Alderson*, B.—The difficulty is, that you do it by one paper, which contains the acknowledgment of all having been paid.] There was no debt due at the time the money was paid but this sum of two guineas. As fast as the work was done the money was paid for it ; and at last the balance due is two guineas, for which the receipt is given. The case does not come within either branch of the clause. The first branch refers to a *general* acknowledgment of any debt, whereof the amount shall not be therein specified, having been paid ; but in the second branch the word *general* is omitted, and the words are “whereby any sum of money shall be acknowledged to be received *in full* or in discharge of any debt.” This is clearly not a *general* acknowledgment of a debt, the amount of which is not specified, having been paid ; nor is it an acknowledgment of money having been received *in full* of any debt ; it is merely a receipt for the sum of two guineas, the balance or residue of the account. The words must be construed strictly, and the subject is not to be charged unless the case be clearly within the language of the statute. [*Alderson*, B.—Suppose the receipt were to mention the sum paid,

and also to contain a general acknowledgment of the debt having been paid, would not that be within the act ?]

1845.

BIRT

v.

LEIGH.

Atherton (*Knowles* with him), in support of the rule, was stopped by the Court.

POLLOCK, C. B.—All you can have is a verdict for 1*s.*, or a new trial. I am very sorry it is so, but we must shut out the receipt altogether, for it is clear that it ought to have had a 10*s.* stamp. It is an acknowledgment of a sum therein mentioned being received in satisfaction of a debt, whereof the amount is not therein specified, within the words of the schedule.

The other Judges concurred.

Rule absolute.

SURMAN and Others v. DARLEY and Others.

May 28.

THIS was an action of trespass for breaking and entering a close of the plaintiffs, called Covent Garden Theatre, in the parish of St. Paul's, Covent Garden, and taking the goods of the plaintiffs therein. The defendants having pleaded not guilty, and issue having been joined thereon, the facts were, by a judge's order, stated for the opinion of the Court, in the following case:—

The plaintiffs are the proprietors in possession of Covent Garden Theatre, and the defendants, at the time of the trespass, were the churchwardens of St. Paul's, Covent

By a local act, 51 Geo. 3, c. cl., after reciting a former act of the 12 Car. 2, whereby a yearly sum of £250 was charged upon the houses of the inhabitants of St. Paul's, Covent-garden, except Bedford House, for the support and benefit of the rector, curate, clerk,

and sextons for the time being of that parish, that charge of £250 was repealed, and in lieu thereof a yearly sum of £520 was charged upon all houses within the said parish, to be assessed by the churchwardens, and paid by the occupiers of such houses respectively, and recoverable, in case of refusal to pay the sums assessed on the house or houses in their occupation, by distress:—*Held*, that the word "houses" in this act meant houses intended for human habitation, and that Covent Garden Theatre was not rateable under the act.

1845.
 SURMAN
 v.
 DARLEY.

Garden. The statute 51 Geo. 3, c. cl, local and personal, public, enacts, by sect. 1, as follows:—"Whereas an act was passed in the twelfth year of his late Majesty Charles II, intituled 'An Act for making the Precinct of Covent Garden Parochial,' whereby it was, amongst other things, enacted, that the yearly sum of £250 should from thenceforth be, and the same was, thereby charged upon the houses of the inhabitants of St. Paul's, Covent Garden, in the county of Middlesex, except the house then commonly called Bedford House, with the appurtenances, for the support and benefit of the rector, curate, clerk, and sextons, for the time being, of the said parish; and whereas, from the very great advance in price of the articles of necessary consumption, it is expedient that the said sum of £250 should be increased," &c. The act then repeals the charge of £250, and all the powers and provisions relating thereto. Sect. 2 enacts, "that, in lieu of the said sum of £250, the yearly sum of £520 shall, from the 25th day of March next before the passing of this act, be, and the same is, hereby charged upon all *houses* within the said parish of St. Paul's, Covent Garden." It then enacts, that the said sum shall be yearly assessed by the churchwardens, "after a formal vote, according to the fair and yearly rent or improved value of such houses respectively:" that such rates and assessment shall be borne and paid "by the respective occupiers of such houses respectively," and shall be collected by the persons appointed by the churchwardens. Sect. 3 enacts, that, in case of neglect or refusal by parties liable to pay the sums "rated and assessed upon the *house or houses* in his or their occupation, or upon him, her, or them in respect thereof," the same may be levied by distress.

The statutes 12 Car. 2, c. 37, and 51 Geo. 3, c. cl, and the stat. 10 Geo. 4, c. lxxviii, local and personal, public, are to form part of this case.

The plaintiffs were assessed in the yearly sum of

33l. 8s. 8d., as the occupiers of Covent Garden Theatre, described as "a certain house, situate in Bow-street." The premises in question are used by certain persons, with the permission of the plaintiffs, for dramatic exhibitions, for money, which money is received by the said persons on their own account, they paying a large sum to the plaintiffs for the use of the premises. No person sleeps or resides on the said premises; none of the proprietors are resident in the said parish; nor do any of them, by themselves or any other person, occupy the said premises, or any part thereof, otherwise than aforesaid.

The question for the opinion of the Court is, whether the Theatre Royal, Covent Garden, was, at the time of the making of the said rate, properly liable to assessment under the 5l Geo. 3, c. cl. If the Court should decide in the affirmative, judgment is to be entered for the defendants; if in the negative, for the plaintiffs, in such form as the Court shall direct.

Jervis, for the plaintiffs.—The question to be determined in this case simply is, whether Covent Garden Theatre is to be considered a *house*, within the meaning of the 5l Geo. 3, c. cl. It will be observed, that that word is coupled in the act with the word "occupier" and the words "house and houses in his or their occupation." The intention of the act clearly was, that payment of this rate should be made only in respect of houses which were capable of being occupied as dwelling-houses. In *Aldred's case* (a), it is said that "the habitation of man is the principal end of a house." In Russell on Crimes, (vol. ii, p. 552, 3rd edit.), under the title "Arson," the word "house" is defined to mean "a dwelling-house, and all out-houses which are parcel thereof." In accordance with this definition, the Court of Queen's Bench held, in *Elmore v.*

1845.
SURMAN
v.
DARLEY.

(a) 9 Rep. 58 a.

1845.
 SURMAN
 v.
 DARLEY.

The Hundred of St. Briavell's (a), that a building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was not a house within the meaning of the 7 & 8 Geo. 4, c. 81. Here the whole context of the act of Parliament, and the object of the rate, lead to the conclusion that it was to be payable in respect of those houses only which were capable of occupation as dwelling-houses. The pastoral care and spiritual superintendence of the rector were the original consideration for the payment; but where there is no occupation by the parties as parishioners, that consideration fails altogether.—He cited also *Rex v. Adlard* (b).

Bodkin, contra.—These two acts of Parliament must be read together in determining this question. Their objects are quite distinct. The statute of Charles II merely directs that the sum of £250 shall be chargeable upon “the houses of the inhabitants” of the parish of St. Paul’s, Covent Garden, for the support and benefit, not only of the rector, but also of the curate, clerk, and sextons of the parish: so that the spiritual services of the rector were not, as has been said, the sole consideration for the charge. Then, the state of property in the district, and the services to be performed by these persons, having become materially altered and increased since the passing of that act, the 51 Geo. 3, c. cl., repealed all the former provisions on the subject, and for the purpose of raising the larger yearly sum which had become necessary for these purposes, imposed a rate upon “all houses *within* the said parish.” The intention of this act appears to have been, that no buildings whatever which are capable of a beneficial occupation should be exempt from assessment. And the word “house” does not necessarily conflict with this interpretation; for a

(a) 8 B. & Cr. 461; 2 Man. & Ry. 514.

(b) 4 B. & Cr. 772; 7 D. & R. 340.

1845.
 SUBMAN
 v.
 DARLEY.

in accordance with the meaning of the first act of Parliament. And the reasonable inference from both acts is, that the same description of property was intended to be charged by both. The words are somewhat different, but if such an alteration had been contemplated as the rating of theatres, (which existed at that time in the parish), one cannot doubt that it would have been expressed clearly, and not have been left to inference.

PLATT, B.—The statutes of Charles II and George III have the same object in view. The former makes the houses of the inhabitants of St. Paul's, Covent Garden, alone liable to be rated. That clearly can be applied to dwelling-houses only. Then the only object of the latter act appears to be to increase the stipend of the rector. The second section points out the persons and the subject-matter liable to be rated, the rate being charged upon "all houses within the said parish," and to be paid by "the respective occupiers of such houses:" that is, all dwelling-houses capable of being occupied and inhabited by man. Other acts of Parliament of the same kind expressly mention out-houses, warehouses, and other buildings, as subjects of local taxation; which seems to shew that the word "houses" was not considered, by the framers of those acts, comprehensive enough to include those descriptions of buildings. The only difference, in truth, between the act of Charles II and that of George III is, that by the former the houses of inhabitants are rateable, and by the latter those of occupiers: but in both cases the word "houses" means those dwellings which are fit for the habitation of man.

Judgment for the plaintiffs.

1845.
RAWLINSON
v.
CLARKE.

geon and apothecary; to wit, one Sarah Smith. The defendant pleaded, (*inter alia*), that he did not carry on or exercise the practice or profession of a surgeon and apothecary *modo et formâ*, on which issue was joined. At the trial, before *Pollock*, C. B., at the sittings in Middlesex after Hilary Term, it was proved on the part of the plaintiff, that, after the execution of the deed set forth in the declaration, the defendant attended several ladies within the three miles, in their confinement; and that on one occasion he received from a Mrs. Smith a sum of fourteen guineas for his services. The defendant then gave evidence to shew that the attendances in question took place with the knowledge and consent of the plaintiff, and in consequence of a request on his part that the defendant would, for a certain period after the date of the deed, continue to visit the patients, for the purpose of assisting the plaintiff, and "keeping the connexion together." It was contended for the defendant, first, that this evidence did not establish any breach of the covenant; and, secondly, if it did, that the £500 was in the nature of a penalty, and not of liquidated damages, and the plaintiff was entitled, at all events, to recover only the actual damage sustained by him by reason of the particular breach of covenant proved. The Lord Chief Baron was of opinion, that, if the plaintiff was entitled to recover at all, the £500 was the measure of the damages; and he left it to the jury to say, whether the defendant visited the patients in question with a view of exercising his business of a surgeon and apothecary, or to assist the plaintiff in his business; and whether, in particular, he visited Mrs. Smith with the knowledge and consent of the plaintiff. The jury found, that the defendant exercised the practice of a surgeon for the purpose of assisting the plaintiff; and the verdict was thereupon entered for the plaintiff for £500 damages, with liberty to the defendant to move to enter a verdict for him on the above issue, or to reduce the damages to 7*l.* 7*s.*,

which the jury found to have been the actual damage sustained by the plaintiff.

In Easter Term, (April 15), *Crowder* moved accordingly, and obtained a rule to shew cause on the first point; the rule being refused as to the reduction of the damages, for the same reasons as were stated by the Court in the case of *Green v. Price* (a).

1845.
 RAWLINSON
 v.
 CLARKE.

Watson and *J. Henderson* now shewed cause.—The only question now to be determined is, whether that which was proved at the trial to have been done by the defendant constituted a breach of this covenant. The finding of the jury is, in substance, that the defendant has practised as a surgeon and apothecary within the prohibited limits. He did everything that belongs to the character of a surgeon; de facto he attended the patients in his surgical character, and he did this for his own profit. The meaning of the covenant is, that the defendant shall not, within those limits, hold himself out as a practising surgeon, even though he may have *no* patients,—nor shall he act as one by visiting patients. The motive with which he does so cannot make it less a breach of this covenant, which is absolute and unrestricted in its terms. [*Rolfe*, B.—It is not a covenant merely not to visit patients, but not to *carry on the profession* of a surgeon and apothecary *by* visiting patients.] Nor can the circumstance of his having attended these persons with the consent or at the request of the plaintiff affect the case. A parol license cannot discharge a covenant under seal: *Cordwint v. Hunt* (b); *West v. Blakeway* (c). Suppose the finding of the jury had been expanded on the record; viz. that the defendant did carry on and exercise the practice and profession of a surgeon, with the knowledge and consent of the plaintiff, and in order to assist him in his business; would that have

(a) 13 M. & W. 695.
 (b) 8 Taunt. 596.

(c) 2 Man. & G. 729; 3 Scott,
 N. R. 199.

1845.
 RAWLINSON
 v.
 CLARKE.

constituted any defence? It is no more than mere leave and license. [*Alderson*, B.—Would the going into partnership with the plaintiff himself be a breach of the covenant?] Yes; that also would be merely leave and license, which could not dispense with the covenant. [*Alderson*, B.—Do not the words, “by himself or in co-partnership with any other person or persons,” mean with any other person or persons than either of the parties?] No; any other than himself. But in this case no question of partnership arises. [*Alderson*, B.—The question really is, whether the defendant was carrying on the business, or whether the plaintiff was not carrying it on by his means.]

Crowder and *Charnock*, in support of the rule, were stopped by the Court.

POLLOCK, C. B.—The question in this case is, whether the defendant has been guilty of a breach of his covenant; the covenant being, “that he shall not nor will, directly or indirectly, by himself or in partnership with any other person or persons, carry on or exercise the practice or profession of a surgeon and apothecary, or either of them, either by residing, or visiting any patient, within the distance of three miles from the present place of business” of the defendant, in Park-street, Camden Town. Now the facts disclosed on the trial were these: that in several instances the defendant visited sick persons within the three miles, but in each of these cases it was perfectly well known to the plaintiff that he did so; indeed, that his attendance was not only known to but requested by the plaintiff, in order that the connexion might be kept together, and the patients gratified by having the medical attendance of a person in whom they were used to confide. And I think the jury properly found, when the case was left to them, that the defendant, in these instances, exercised the practice of a surgeon for the purpose of assisting the

1845.
RAWLINSON
v.
CLARKE.

ROLFE, B.—I am of the same opinion. I should be sorry, however, to think that, in our decision, we were violating the rule of law which has been pressed at the bar, that it can be no answer to a breach of such a covenant, that it was committed with the license or consent of the plaintiff, at least on these pleadings. But the consent of the plaintiff is referred to here, not as justifying a breach of the covenant, but as shewing that the acts done by the defendant did not constitute a breach of the covenant. Now what is the covenant? Not that the defendant will not do any act which is part of the business of a surgeon or apothecary within the specified limits—for undoubtedly he has done that,—but that he will not carry on or exercise that business, directly or indirectly (which are words not unimportant), by himself or in partnership with any other person or persons, either by residing or visiting any patient, within those limits. Now, looking to the object of the parties, and to the important words “by himself or in partnership with any other person or persons,” I cannot doubt that the true construction of the covenant is, that he shall not carry on the business, alone or in partnership, on his own account—not that he shall not do any act, in case of emergency, which is a part of the business of a surgeon or apothecary. I come to that conclusion, not only on the other grounds which have been adverted to by my learned Brothers, but also on the words “directly or indirectly.” How could he *indirectly* do an act of this nature? There could not be any indirection in doing a gratuitous act for the assistance of another. The consent of the plaintiff, therefore, is most important, not as establishing a defence to a broken covenant, but as shewing what was in truth the breach of covenant.

Rule absolute.

1845.
 BENBOW
 v.
 JONES.

ingly, by his direction, paid over to the owner of that horse. The plaintiff thereupon brought this action against the defendant, who was the secretary of the race committee, and the holder of the stakes.

It was contended for the defendant, that, after the decision of the steward that the plaintiff had not conformed to the conditions of the race, and was not, therefore, entitled to the stakes, the plaintiff could not maintain any action to recover them. The plaintiff's counsel insisted, on the other hand, that the decision of the steward was informal and irregular, having been pronounced before the race was run, and that the plaintiff was not bound by it; and evidence was given on his behalf, to shew that Walker was not a professional jockey. The learned Judge, in summing up, left it to the jury to say, first, whether Walker was a professional jockey or not; and secondly, whether the steward had finally decided the matter or not; intimating his opinion, that there could be no valid decision without hearing both parties. The jury found both points in favour of the plaintiff, and returned a verdict for him for the amount claimed; upon which leave was reserved to the defendant to move to enter a nonsuit.

Talfourd, Serjt., in last Michaelmas Term, obtained a rule accordingly, against which

Whateley and *J. W. Smith* now shewed cause.—The jury have, by their finding, decided this case in favour of the plaintiff. They have found that Walker was not a professional jockey, and that Giles, the steward, had not finally decided the question; nor had the latter done so, for he had not heard the parties. He had never decided in the proper sense of the term, that is, upon a hearing; although he took upon himself, on the strength of the opinion he had obtained, to pay over the money to the owner of the second horse. And the point reserved for the consideration of

1845.
BENBOW
v.
JONES.

reserved is, whether, assuming that there was a decision of the steward in fact, it was or was not so regular and formal as to make it valid in point of law. But we are all of opinion, that the decision of the steward in fact was final, and the rule will therefore be absolute.

ALDERSON, B.—It would be very strange to say, that it is to be held, that all the proceedings before the steward of races are to be according to the strict rules of law; that there is to be a point regularly raised before him, and parties heard upon it—I suppose by counsel,—and a formal decision after the hearing. It would next be said that the evidence must be given upon oath. The truth is, the parties mean that the matter shall be subject to the decision of the steward; and that, if he decides in fact, that shall be final.

ROLFE, B.—I am of the same opinion; but I must add, that it does not appear upon the evidence that there was *not* a hearing of the plaintiff before the decision was given; and it surely cannot matter that the question as to the jockey's qualification was argued before the race began: the decision was not until the following day.

Rule absolute.

1845.

WINWOOD v. HOULT.

May 27.

THIS was a rule moved with a view to issue execution under 1 & 2 Vict. c. 110, s. 18, which called upon the defendant to shew cause why he should not pay to the plaintiff money due upon an award and the Master's allocatur for costs. This rule was moved on an affidavit verifying the award, and which stated that the award and allocatur, together with the rule making the order of reference a rule of Court, had been personally served on the defendant, and the amount duly demanded. The rule of Court did not express the amount payable under the award. One question made on moving for the rule was, whether it should be a rule absolute in the first instance or a rule nisi only. [*Pollock*, C. B.—The application is to turn an award into a judgment, so as to issue execution. As there may be some objection made to it, we think it ought to be a rule to shew cause.]

A rule to issue execution under 1 & 2 Vict. c. 110, s. 18, for money due upon an award and the Master's allocatur, is a rule nisi only in the first instance. And *semble*, that such a rule ought to be personally served, notwithstanding that the award and allocatur, together with the rule making the order of reference a rule of Court, have been personally served, and the amount demanded.

Streeten, on now moving to make the rule absolute, stated that there had not been personal service of the rule nisi, but that a copy of it had been delivered to the defendant's wife at his residence, and the original rule shewn to her. [*Alderson*, B.—Ought not the rule to have been served personally?] The cases on this subject are somewhat inconsistent. Undoubtedly, in *Jordan v. Berwick* (a), *Patteson*, J., appeared to be of opinion, that, as this was a new practice introduced in lieu of an attachment, the rule ought to be served personally; but that case may be distinguished on the ground that there had been no personal service of the award and allocatur in the first instance, or anything to bring the award to the personal

(a) 1 Dowl. P. C., N. S., 271.

1845.
 WINWOOD
 v.
 HOULT.

knowledge of the defendant, whereas here the award and allocatur had been personally served upon him, and a demand made of the amount. Besides, in the more recent case of *Doe d. Moody v. Squire* (a), *Wightman*, J., was of opinion that it was not necessary to go through the same forms which were necessary in cases of attachment. In *Wilson v. Foster* (b), *Tindal*, C. J., said, "There must be fair ground for supposing that the defendant has seen the award, and is aware of its contents." [*Alderson*, B.—Here there is every reason to believe that you can serve the defendant personally, for it appears that you know where he resides. *Platt*, B.—Is not this like the case of an attachment? If so, it ought to be served personally.] In the recent case of *Hawkins v. Benton* (c), *Patteson*, J., appears to have been of opinion that the same strictness of service as that required in cases of attachment was not in all cases necessary. And where there has been personal service of the award and allocatur, personal service of the rule cannot be necessary.

ALDERSON, B.—You had better enlarge your rule, and serve it personally.

ROLFE, B., and PLATT, B., concurred.

Rule enlarged.

(a) 2 Dowl. P. C., N. S., 327. (b) 12 Law J., N. S., C. P., 330.
 (c) 2 Dowl. & L. 465.

1845.

DAVEY v. WARNE.

May 29.

TRESPASS for seizing and taking divers goods and chattels, to wit, three ladders, one scaffold board, one pail, one brush, and four cords, of the plaintiff, whereby he the said plaintiff was prevented from completing a contract for repairing, plastering, and colouring a house, and thereby lost the gains and profits which he otherwise would have acquired. The defendant pleaded, first, as to the said trespasses in the declaration mentioned, so far as they related to two of the said ladders, and to the said cords, that, after the making and passing of a certain act of Parliament made and passed in the 23 Geo. 3, intituled "An Act for better paving, cleansing, and lighting the parish of St. Anne, and such part of Cock-lane as lies in the parish of St. Martin-in-the-Fields, within the liberty of Westminster, and for removing and preventing nuisances therein," and after the making and passing of another act of Parliament of the 57 Geo. 3, intituled "An Act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," and before the said time when, &c. in the declaration mentioned, and on the second Thursday in the month of February, A.D. 1843, to wit, on the 9th day of February, in the year last aforesaid, the inhabitants of the said parish of St. Anne, Westminster, then having a right to assemble in the vestry of the said parish, did, according to the power and authority by the said first-mentioned act of Parliament given, assemble and meet in the vestry room of the said parish, between the hours of ten in the morning and two in the afternoon of the said last-mentioned day, and did then and there

A surveyor appointed under the Metropolitan Paving Act, 57 Geo. 3, c. 29, has no right, under the 75th section of the act, to remove a ladder placed against a house for the purpose of whitewashing it, for that section applies only to the erection of boards or scaffolding, or to the placing of posts, bars, rails, or boards, by which an inclosure is made.

A license granted by the surveyor under that section, to erect a hoard or scaffolding, &c., on the footway of No. 14, Porter-street, was held not to authorize the licensee to erect one in another street or court, although it formed one of the sides of the house in Porter-street.

Where an act provided that a plaintiff should not recover in any action for anything done in

pursuance of the act, unless twenty-one days' notice of action should be given—*Held*, that the defendant must plead the want of such notice, or he could not avail himself of it.

1845.

DAVEY
v.
WARNE.

elect and appoint twenty-one persons, namely, Henry Williams, &c. (setting out the names), the same then being householders and resident in the said parish, and assessed to and paying their respective shares of the rates or assessments made by virtue of the first-mentioned act, to be a committee for the better and more effectually carrying the said first-mentioned act into execution. And the defendant further says, that, at and always from the time of the passing of the said secondly-mentioned act, the said parish of St. Anne was, and yet is, included within the operation of the said secondly-mentioned act. And the defendant further says, that, after the said appointment of the said twenty-one persons to be commissioners as aforesaid, for the purposes aforesaid, and while they were such commissioners, and after the making of the secondly-mentioned act, and before the said time when, &c. in the declaration mentioned, to wit, on the 10th day of February, A.D. 1843, there then being no surveyor or surveyors of the pavements within the said parish of St. Anne, the said commissioners, then being the persons having the control of the pavements of the said parish, so included as aforesaid, and having then first duly taken and subscribed the oath required by the said first-mentioned act to be taken by the committee-men or commissioners, according to the first-mentioned act, did, at a certain meeting of the said commissioners, then by them holden in the vestry-room of the said parish, within fourteen days after they were so chosen, according to the power and authority given to them by the said secondly-mentioned act in that behalf given, duly and legally appoint the defendant to be the surveyor of the pavements within the said parish of St. Anne, he the defendant then, at the time of the said last-mentioned appointment, being a competent person in that behalf, and a housekeeper, and having an office within the said parish of St. Anne, which appointment he the defendant then accepted, before the said time when, &c. in the declaration

mentioned, to wit, on the day and year last aforesaid. And the defendant further says, that, at the time of the last-mentioned meeting, and at the respective times when they so took the said oath, and so appointed the defendant to be such surveyor, the said commissioners were each of them resident and a householder in the said parish of St. Anne, and assessed to and paying his share of the rates or assessments made by virtue of the said first-mentioned act, and also seised and possessed of real and personal estate together of the value of £2000 over and above debts and reprisals, and did not hold any office of profit, and was not in any way interested or concerned in any contract or work to be done in or about the execution of any of the powers of the said first-mentioned act. And the defendant further says, that, under and by virtue of the said last-mentioned appointment, he the defendant continued to be and was the surveyor of the pavements within the said parish of St. Anne, from the said time when he was so appointed as aforesaid, up to and until and at and after the said time when, &c. in the declaration mentioned. And the defendant further says, that, after his said appointment as such surveyor of the pavements aforesaid, and while he continued such surveyor as aforesaid, and before the said time when, &c. in the declaration mentioned, to wit, on the day and year in the declaration mentioned, he the plaintiff did, at No. 14, Porter-street, being a house fronting a street called Porter-street, on one of the sides of the said house, and fronting Newport-court, hereafter mentioned, on one of the other sides of the said house, wrongfully and unlawfully, for the purpose of using the same in doing some plasterers' work at the said house, set up in a certain public place in the said parish of St. Anne, and within the jurisdiction of the said secondly-mentioned act, and within the jurisdiction of the defendant as such surveyor as aforesaid, which said public place then was called

1845.

DAVEY
v.
WARNE.

1845.
DAVEY
v.
WARNE.

Newport-court, two of the said ladders in the declaration mentioned, and then so set up the same there, that each of the said ladders was so then and there set up in the manner following, that is to say, by tying the said two ladders together with the cords in the declaration mentioned, and placing the same, so tied, against the said No. 14, Porter-street, in such a manner that one of the said ladders then stood upon the ground of Newport-court aforesaid, and was prevented from touching the said No. 14, Porter-street, by reason of its being so tied to the other of the said two ladders; and that the other of the said two ladders rested against the said No. 14, Porter-street, and was supported and prevented from touching the ground by the first-mentioned of the said two ladders, contrary to the form of the said secondly-mentioned act; and then wrongfully and unlawfully, and contrary to the form of the said secondly-mentioned act, continued the said two ladders so wrongfully set up in the said public place as aforesaid, until the defendant, at the said time when, &c. in the declaration mentioned, then and still being the surveyor of the pavements within the said parish for the time being, as such surveyor, in pursuance of the said secondly-mentioned act, in order to pull down and remove the same two ladders and cords, seized and took the said two ladders, and the said cords by which the same were so tied as aforesaid, and then pulled down, and removed, and carried away the same to a convenient place, and there kept the same until the defendant did, at the request of the plaintiff, restore the said two ladders and cords to the plaintiff, doing no unnecessary damage to the plaintiff on the occasion aforesaid. And the defendant further says, that he was not, at the time of his said appointment to the office of surveyor of the pavements, as aforesaid, nor after such appointment, at any time before or at the said time when, &c. in the declaration mentioned, did

he become, a commissioner or a trustee or a person having the control of the pavements of the said parish of St. Anne, by virtue of the said first-mentioned act, or any other local act or acts of Parliament, or otherwise, nor a pavior, or mason, or dealer in stones; and that he had not, at the time of such appointment as aforesaid, or at any time afterwards before or at the said time when, &c. in the declaration mentioned, any share or interest in any employment or contract for the pavement, or reparation of the pavement, of the said parish of St. Anne, nor in any other public works under the said commissioners, being the persons having such control as aforesaid alone; and that he the defendant did not before or at the said time when, &c. in the declaration mentioned, cease to be a housekeeper, or to have an office within the said parish of St. Anne, nor otherwise become disqualified by virtue of the said secondly-mentioned act.

There was another plea to the same effect, justifying the removal of the other of the ladders in the declaration mentioned, at a house No. 15, Porter-street.

As to the pail, &c. the defendant pleaded payment of 40s. into Court, and no damages *ultra*.

To the first plea the plaintiff replied, that the said two ladders, so tied with the said cords, were, just before the said time when, &c., to wit, on the day and year in the declaration mentioned, necessarily and properly set up, as therein mentioned, for the purpose of doing plasterers' work to and repairing the said house, No. 14, Porter-street, by the leave and license in writing, before the setting up the said two ladders, and before the said time when, &c., to wit, on the 13th day of December, 1843, had and obtained under the hand of the defendant, then being such surveyor as aforesaid, for the purpose of doing the said plasterers' work, and repairing the said house, No. 14, Porter-street, which said license then specified the length

1845.
DAVEY
v.
WARNE.

1845.

DAVEY
v.
WARNE.

of time for which the said ladders, when so set up, might be continued, to wit, for two days, according to the form of the statute in such case made; and at the said time, when, &c. the said period in the said leave and license specified had not elapsed, and the said ladders were then necessarily and properly set up for the purpose aforesaid, according to the said leave and license.—Verification.

The replication to the second plea was in the same terms, as to the other ladder mentioned in the declaration.

To the third plea, the plaintiff replied damages *ultra*, upon which issue was joined.

The rejoinders to the replications to the first and second pleas traversed that the said ladders were set up by the leave and license of the defendant *modo et forma*: upon which issue was joined.

At the trial, before *Pollock*, C. B., at the Middlesex sittings after last Michaelmas Term, it was proved that, a ladder having been set up by the plaintiff on the footway in Newport-court, Westminster, against the wall of a house, No. 14, Porter-street, and another having been set up in Porter-street, against the house No. 15 in that street, they were both (together with some other things, covered by the payment into Court) removed by persons acting under the orders of the defendant, who was the surveyor of pavements of the parish of St. Anne, within which the houses were situated, and who was duly appointed under the provisions of the 57 Geo. 3, c. 29, s. 2, (local and personal). Before putting up the ladders, it appeared that the plaintiff had applied for a license to the defendant to do so, and that the following license was accordingly granted:—

“Parish of St. Anne, Westminster.

“I, Edmund Warne, being the surveyor of pavements for the parish of St. Anne, Westminster, do grant Mr.

Davey, of 11, Princes-row, this license to erect ladders on the footway of No. 14, Porter-street.

“ This license is granted by me, the said surveyor, for two days; and as soon as the work is completed, the said — Davey must give notice in writing thereof to the surveyor of pavements for the time being of the said parish, in order that the paving and other property displaced or injured may be restored by proper workmen under his direction, the expense of which being ascertained, the balance (if any) of the deposit money is to be returned to him the said — Davey.

“ This license will be void, and subject the persons to whom it is granted to — penalties, for violations of the law, if he or they at any time neglect to form a board or platform, and rails for foot-passengers round such board, and cause the same to be lighted from sunset to sunrise; or if he or they neglect to paint the scaffold-poles and ladder white at least eight feet from the ground upwards, if required so to do; or, if the platform and paving adjoining thereto be not kept clean and free from rubbish or other obstruction.

“ Edmund Warne.”

In pursuance of this license, ladders were put up in the manner mentioned in the pleas; but the defendant, conceiving that they were put up in places and in a manner not warranted by the license, ordered them to be removed, and they were accordingly removed. At the trial, it was contended for the plaintiff, that the ladder set up against the house No. 14, Porter-street was, at all events, within the meaning of the license, which must be taken to authorize the putting it up against any part of the house, whether upon the side in Porter-street, or upon that in Newport-court. On the other hand, the defendant's counsel contended that the license was to be construed strictly, and could only authorize the setting up the ladder *in* Porter-

1845.
DAVEY
v.
WARNE.

1845.
DAVEY
v.
WARNE.

street, against the house No. 14. They also contended that the defendant was entitled to notice of action under the 132nd section of the local act, and, the notice given being insufficient, that the defendant was entitled to succeed on that ground, although he had not pleaded the want of such notice. The learned Judge was of opinion that the license did not warrant the putting up the ladder either in Newport-court, against the house No. 14, Porter-street, nor in Porter-street, against the house No. 15, and the jury, under his lordship's direction, found a verdict for the defendant.

Humfrey, in Hilary Term last, obtained a rule for a new trial, on the ground of misdirection, or for judgment non obstante veredicto upon the first and second issues.

Jervis (*Monteith* with him) now shewed cause. — The direction of the learned Judge was perfectly right. The first question arises on the construction of the 75th section of the Metropolitan Paving Act, 57 Geo. 3, c. xxix. which enacts, "that no person or persons whomsoever shall erect, place, set up, or build, in any street or other public place, in any parochial or other district within the jurisdiction of this act, at any time or times hereafter, any hoard or scaffolding, or place or erect any posts, bars, rails, boards, or other thing by way of inclosure, for the purpose of making mortar, or of depositing or sifting, screening or slacking any bricks, stone, lime, sand, or any other materials for building or repairing any house or other tenement or erection, or for other works, or for any other purpose, without leave or license first had and obtained under the hand of the surveyor," &c. A license granted under this act must be construed strictly for the benefit of the public; and it is clear that this license only authorized the plaintiff to erect a ladder against the house No. 14, *Porter-street*. The ladder must be placed in *Porter-street*,

and the plaintiff was not justified in placing the ladder in Newport-court, though it were placed against the back of the house, 14, Porter-street. [*Alderson*, B.—If this were a question of erecting a hoard, it might stop up the thoroughfare altogether, if placed in Newport-court.] The act says you shall not erect, set up, or build any hoard or scaffolding, or place or erect any posts, bars, rails, boards, or other thing by way of inclosure, for the purpose of making mortar, &c., without the license of the surveyor. Now here the plaintiff had no license to erect a ladder, except in Porter-street, against the house No. 14. [*Rolfe*, B.—I think the passage should be read, making a parenthesis, beginning with the words “by way of inclosure,” and ending with the word “materials.” It is, that you shall not erect or build any hoard or scaffolding, or place or erect any posts, &c., for building or repairing any house, or for other works, by which an inclosure is made.] Secondly, the same act, by the 132nd section, requires a notice to be given twenty-one days before the commencement of the action, for anything done in pursuance of the act, signed by the attorney for the plaintiff; and it enacts, that no such person shall recover in any such action unless such notice shall have been given. No such notice has been given here, for the notice which was given was not signed by the attorney, but by the plaintiff himself. [*Alderson*, B.—In order to take advantage of the want of notice, ought you not to have pleaded it?] No; it is contended that the act requires that notice should be shewn to have been given in every case, whether the want of it be pleaded or not: *Wagstaffe v. Sharpe* (a), *Wills v. Langridge* (b). Lastly, the license given in evidence did not support the replication to the first and second pleas.

1845.
DAVEY
v.
WARNE.

(a) 3 M. & W. 521.

(b) 5 Ad. & E. 383; 6 Nev. & M. 831.

1845.
 DAVEY
 v.
 WARNE.

Humfrey and Corrie, in support of the rule.—First, no license was necessary here, for the words of the 75th section do not apply to a ladder put up for the purpose of whitewashing a house, but only to cases where *inclosures* are made. The words “by way of inclosure” govern the whole sentence. [*Alderson*, B.—It means to fix something on the spot; not merely to place it there for a moment. If it were otherwise, a person could not put up a fire-escape without a license.] The placing of a ladder is clearly not included among the things prohibited by the 75th section, which speaks of the erection of a hoard or scaffolding, or the putting up of posts or bars by way of inclosure. If the defendant’s construction be correct, it would be almost impossible for a window to be cleaned without a license. Therefore the first and second pleas are not a sufficient justification for taking away the ladders. Secondly, this license, if one were necessary, did justify the placing of the ladder in Newport-court. The words “No. 14, Porter-street” are descriptive of the house, and were sufficient to entitle the plaintiff to place his ladder against any part of the house, or on any side of it. Thirdly, the defendant cannot take advantage of the want of notice without pleading it. In the case of *Wagstaffe v. Sharpe* (a), the language of the act was very much stronger than the present: it was thereby enacted, that “no apothecary shall recover any charges made by him, in any court of law, unless such apothecary *shall prove on the trial*” that he was in practice before the day when the act passed, or had obtained his certificate. But the words of this act only require the notice to be given, leaving the question whether it has been given or not to be properly raised by the pleadings, and does not require it to be proved whether it is a matter in issue or not. Even in *Wagstaffe v. Sharpe*,

(a) 3 M. & W. 521.

1845.

June 4.

JEFFREYS *v.* EVANS and Others.

It is no answer to an action on a promissory note, that it was given on account of an attorney's bill, not delivered, pursuant to 6 & 7 Vict. c. 73, before action brought.

ASSUMPSIT on a promissory note for £80, made by the defendants, payable to the plaintiff or his order, with interest, three months after date. There was also a count on an account stated.

Plea, as to the cause of action in the first count mentioned, so far as it relates to £60, parcel of the money in the first count mentioned, and to the said interest upon the said sum of £60, and as to £60, parcel of the money in the last count mentioned; that before and at the time of making the said note in the first count mentioned, to wit, on the day in the said first count in that behalf mentioned, the plaintiff was, and at the time of the commencement of this suit also was, an attorney of the court of our lady the Queen before the Queen herself, and as such attorney was, before and at the time of the making of the said note, employed by the said Thomas Evans to do certain business for him the said Thomas Evans, and to make disbursements for the said business, for reward to the plaintiff in that behalf, on the sole account of him the said T. Evans; and further, that the said note in the first count mentioned, as far as relates to the sum of £60 and the interest thereon, in the introductory part of this plea mentioned, was so as in the first count mentioned made by the defendants, and taken by the plaintiff, for and on account of the fees, charges, and disbursements that were then and thereafter did become due and payable from and by the said T. Evans to the plaintiff for the said business, and for no other consideration whatever; and further, that after the making and passing of an act of Parliament made and passed in the session of Parliament holden in the 6th & 7th years of the reign of our lady the now Queen, intituled, "An Act for consolidating and amending several of the

laws relating to attorneys and solicitors practising in England and Wales," to wit, on the 7th day of June, 1844, the plaintiff commenced this action, contrary to the form of the said statute, without having, one calendar month before the commencement of this suit, delivered to the defendant T. Evans, the party to be charged therewith, or sent by the post to, or left for the said T. Evans at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of the said fees, charges, and disbursements, or of any or either of them, or any part thereof, subscribed with the proper hand of the plaintiff, or inclosed in or accompanied by a letter subscribed with the proper hand of the plaintiff, referring to such bill, as was and is required by the statute in such case made and provided; and further, that the said account in the said last count mentioned, so far as relates to the said sum of £60, parcel of the sum therein mentioned, was stated of and concerning the said sum of £60, parcel of the money in the first count mentioned, after the same had become due and payable according to the tenor and effect of the said note, and of and concerning no other money whatsoever; which said sum of £60, parcel of the money in the first count mentioned, was and is the same as the sum of £60, parcel of the money in the last count mentioned; and further, that there never was any consideration, value, purpose, or reason for the defendants, or any or either of them, making the said note, so far as the same relates to the said sum of £60 and the said interest thereon, or paying or agreeing to pay the last-mentioned sum and interest, or any part thereof, except as in this plea aforesaid.—Verification.

Special demurrer, and joinder.—The principal ground of demurrer was, that it is no answer to an action on a promissory note or an account stated, which are independent causes of action, that the note was given or the account

1845.
JEFFREYS
v.
EVANS.

1845.
 }
 JEFFREYS
 v.
 EVANS.

stated in respect of an attorney's bill not previously delivered pursuant to the statute.

E. V. Williams, in support of the demurrer, was stopped by the Court: *Parke*, B., observing—"If, instead of giving a promissory note, the defendants had paid the money, could they have recovered it back? If not, the plea is no defence to the action on the note."—The Court accordingly called on

Lush, for the defendant.—This is a defence which, under the 6 & 7 Vict. c. 73, s. 37, the party may set up at any time before the bill is actually paid. The delivery of the note does not per se amount to payment; and when it becomes due and is dishonoured, the attorney must revert to the original consideration for which it was given. The 37th section enacts, that "from and after the passing of this act, no attorney or solicitor, nor any executor or administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit *for the recovery of any fees, charges, or disbursements* for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, or disbursements, and which shall either be subscribed by the proper hand of such attorney or solicitor," &c. &c. [*Parke*, B.—You seek to add the words—"nor shall commence or maintain any action upon any bond, bill, note, &c. given by way of payment for such fees," &c.] The present plaintiff is in reality maintaining an action for his fees, charges, and disbursements. [*Pollock*, C. B.—No; he is only suing on the security given to him, and which must be considered as hav-

ing been given in discharge of so much of his bill. When the bill is taxed, and the whole account taken, the amount of that security will be set off.] The question is not whether, if the defendant paid the note, he could recover back the money; but whether there has not been a failure of consideration, by reason of the prohibition of the statute, which prevents the attorney from recovering upon it. It seems to be analogous to the case of an insolvent debtor who gives a promissory note for a debt inserted in his schedule; that would be a defence to an action on the note, although, if he paid it, he could not recover back the money. [*Parke, B.*—It is perfectly clear what the statute meant—to protect clients if they chose to be protected, not if they chose to give a bond or bill for the debt. *Pollock, C. B.*—The defendant, instead of pleading to the action, should have applied to tax the bill, and stay proceedings on payment of the sum found due on taxation.]

There is another objection, that the note is given for costs incurred or *to be incurred*, and thereby, by analogy to the case of a warrant of attorney, is void. [*Parke, B.*—That is a defence only as to part; it does not vitiate the contract. *Alderson, B.*—You may shew that when you come to assess the damages.]

PER CURIAM.—There is no doubt in this case: there must be

Judgment for the plaintiff.

1845.
JEFFREYS
v.
EVANS.

1845.

June 4.

WRIGHTSON v. MACAULAY.

A testator devised real estates to his son and heir-at-law, Reginald H., for life, remainder to his first and other sons in tail, remainder to his daughters in fee; and for default of such issue, to his nephew Reginald H., for life, remainder to Richard H., son of his said nephew, for life, remainder to his first and other sons in tail; and in default of Richard's being alive at his father's death, or in case of his being alive and taking an estate under the will, and dying without issue male, then to the use of the male heir who should be in possession of the ancient estate at M., belonging to the H. family, for life, and to his first and other sons in tail; and, for default of a male heir being in possession of the ancient estate at M., or in default of issue male of such male heir, then to the use of the testator's own right heirs, bearing of the name of Heber, in fee.

Reginald H., the son, enjoyed the estate for life, and died without issue; then Reginald the nephew, and Richard, successively enjoyed it for life, and the latter died without issue; and at his death there was no heir of the testator existing of the name of Heber:—*Held*, that the ultimate limitation in fee vested on the death of the testator, in his son and heir-at-law, Reginald H.

BY an order of His Honour the Vice-Chancellor, Sir *James Wigram*, bearing date the 3rd day of August, 1844, the following case was directed to be submitted for the opinion of the Barons of Her Majesty's Court of Exchequer:—

The Rev. John Heber was, at the times of making his will and of his decease, seised in fee simple of certain freehold estates of inheritance, situate in the parish of Buckden, in the county of York.

At the date of the will of the said John Heber, the manors of East and West Marton, and divers estates in the parish of Marton, which for a great number of years had been in the possession of the elder branch of the Heber family, were then vested in Elizabeth Heber for life, with remainder to the testator's nephew, Reginald Heber, (the father of the defendant, Mary Macaulay), for life, with remainder to his first and other sons successively in tail male, with divers remainders over; and this property is described by the Rev. John Heber, in his will, as the ancient estate at Marton, belonging to the Heber family.

The Rev. John Heber duly signed and published his last will and testament in writing, bearing date the 26th day of June, 1775, which was executed and attested in the manner then required by law for rendering valid devises of freehold estates; and thereby (amongst other things) he gave and devised all his freehold messuages, lands, tenements, and hereditaments, with their appurtenances, situ-

ate and being at Marton, Buckden, and elsewhere, which he then was or thereafter should or might be seised of, with their appurtenances, to the Honourable Sir George Cayley, Bart., Reginald Heber, his nephew, and Cuthbert Allanson, and the survivors and survivor of them, and the heir sof such survivor, to the use of his son Reginald Heber, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate, to the use of them the said Sir George Cayley, Reginald Heber his nephew, and Cuthbert Allanson, their heirs and assigns, for and during the natural life of his said son Reginald, [upon trust to support contingent remainders]; and from and after the decease of his said son Reginald Heber, then to the use and behoof of the first son of the body of the said Reginald Heber his son, on the body of Mary his then wife, or any thereafter taken wife, to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the second, third, fourth, fifth, sixth, seventh, and all and every other son and sons of the body of his said son Reginald, on the body of his then present, or any other after-taken wife, to be begotten severally, successively, and in remainder, [in tail male]; and for default of such issue, to the use and behoof of such of the daughter and daughters, if more than one, of the body of the said Reginald Heber on the body of the said Mary his then wife, or of any thereafter taken wife, to be begotten, as should be living at the time of his decease, or should be born in due time afterwards, and the heirs and assigns of such daughter and daughters respectively, if more than one, as tenants in common; and in default of such issue, male and female, of the body of his said son on the body of his then present or any thereafter taken wife, begotten or to be begotten, then to the use and behoof of his said

1845.

WRIGHTSON
v.
MACAULAY.

1845.
 WRIGHTSON
 v.
 MACAULAY.

nephew Reginald Heber, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate, to the use of them the said Sir George Cayley, Reginald Heber his nephew, and Cuthbert Allanson, their heirs and assigns, for and during the natural life of his said nephew Reginald Heber, [upon trust to support contingent remainders]; and after the decease of his said nephew Reginald Heber, then to the use and behoof of Richard Heber, son of the said Reginald Heber, his nephew, if he should be living at his father's decease, for and during the term of his natural life, without impeachment of waste; and after the determination of that estate, to the use of them the said Sir George Cayley, Reginald Heber his nephew, and Cuthbert Allanson, their heirs and assigns, for and during the natural life of the said Richard Heber, son of his said nephew, [upon trust to support contingent remainders]; and from and after the decease of the said Richard Heber, the son of his said nephew Reginald Heber, then to and for the use of the first son of the body of the said Richard Heber lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the second, third, fourth, fifth, sixth, seventh, and all and every son and sons of the body of the said Richard Heber, to be lawfully begotten [successively in tail male]; and in default of the said Richard Heber being alive at the time of his father's decease, or in case of his being alive, and taking an estate for life by virtue of his said will, and dying without issue male of his body as aforesaid, then to the use and behoof of the *male heir* of who should be in possession of, and lawfully entitled for the time being unto the ancient estate at Marton, belonging to the Heber family, and the assigns of such male heir as last aforesaid, for and during the term of his natural life, without impeachment of waste; and from and after the

determination of that estate, to the use of them the said Sir George Cayley, Reginald Heber his nephew, and Cuthbert Allanson, and their heirs, and the survivor of them and his heirs, for and during the natural life of such male heir as last aforesaid, [upon trust to support contingent remainders]; and from and after his decease, then to the use and behoof of the first son of the body of such male heir as aforesaid lawfully begotten, and the heirs male of the body of such first son lawfully issuing, [with similar limitations as before, to the other sons successively in tail male]; and for default of a male heir being in possession of and entitled unto the said ancient estate at Marton, at the times thereinbefore for that purpose respectively mentioned, or in default of issue male of such male heir as aforesaid, then to the use of his own right heirs, being of the name of Heber, and his, her, and their heirs and assigns for ever.

The Rev. John Heber died in the year 1775, without having revoked or altered his will, having had issue two children, and no more; namely, Reginald Heber, the first devisee for life, his eldest son and heir-at-law, and John Heber, who died intestate and without issue, in the lifetime of his father. Reginald Heber entered into possession or the receipt of the rents and profits of the estates in Buckden devised to him for his life, and continued in such possession or receipt up to the time of his death.

Reginald Heber, the son of the testator John Heber, made his will, dated the 19th January, 1799, duly executed and attested to pass freehold estates by devise; but his will did not contain any effectual devise of the estates in Buckden, mentioned in the will of his father, as against his (the said Reginald Heber's) heir-at-law. He died in the year 1799, without ever having had any issue; and Reginald Heber, the nephew of the Rev. John Heber, and the second devisee for life mentioned in his will, and also the tenant for life of the ancient family estates at Marton,

1845.
WRIGHTSON
&
MACAULAY.

1845.
WRIGHTSON
v.
MACAULAY.

then entered into the possession or the receipt of the rents and profits of the said devised estates, and continued in such possession up to the time of his death, which took place in the year 1804; and thereupon his eldest son, Richard Heber, the third devisee for life mentioned in the said will, and also the tenant in tail of the ancient family estates at Marton, entered into the possession or the receipt of the rents and profits of the said devised estates, and continued in such possession or receipt up to the time of his death, which took place on the 14th day of October, 1833. The said Richard Heber never had any issue.

The said Richard Heber, in the year 1827, suffered a recovery of the ancient family estate at Marton, and, by force of the recovery, and the deed to declare the uses thereof, he became entitled thereto as tenant in fee simple in possession, thereby barring the estate tail which had existed in such estates in favour of his younger brother Reginald Heber, the late Bishop of Calcutta. Richard Heber made his will, dated the 1st day of September, 1827, executed and attested in the manner then required by law for rendering valid devises of freehold estates, whereby he gave and devised all his real estate, including, among other things, the ancient estate at Marton, to the defendant (his half-sister), a daughter of his father, Reginald Heber, by his second wife, then Mary Cholmondeley, widow, but now the wife of the defendant, Samuel Herrick Macaulay, who, upon his death in the year 1833, entered into and has ever since continued and is now in possession of that estate.

The eldest brother of the testator John Heber was Thomas Heber, who was tenant for life of the estate called by the testator John Heber, in his will, the ancient estate at Marton, belonging to the Heber family, with remainder to his first and other sons successively in tail male.

Thomas Heber died in 1752, in the life-time of John

Heber, leaving only two sons him surviving, namely, Richard Heber, his eldest son, and Reginald Heber, the second devisee for life mentioned in the will. Richard Heber, the eldest son of Thomas Heber, died in the year 1766, leaving his two children him surviving, namely, Mary Heber and Henrietta Heber.

1845.
WRIGHTSON
v.
MACAULAY.

Henrietta intermarried with William Wrightson, and had by him William Battie Wrightson, her eldest son and heir-at-law, and a daughter, Harriet Wrightson, who afterwards intermarried with and is now the wife of the Honourable Henry Hely Hutchinson. Mary Heber died in 1809, having by her will devised certain specific estates, not including any estate or interest she had or ought to have in the estates devised by will of the Rev. John Heber, to certain persons therein named; and she devised all the rest and residue of her real estate to her niece Harriet Hutchinson, and her heirs.

Henrietta Wrightson died in 1820, and her husband William Wrightson died in 1827, and, upon her death, William Battie Wrightson became, and is now, the heir-at-law of the Rev. John Heber, and of his son Reginald Heber.

Reginald Heber (the nephew of the Rev. John Heber, and tenant for life of the ancient family estate, with remainder to his first and other sons in tail male) had issue by his first marriage one son, namely, Richard Heber, the third devisee for life, and he had by a second marriage three children, and no more, namely, Reginald Heber, Thomas Cuthbert Heber, and Mary Heber, now the defendant Mary Macaulay, the devisee of the said ancient estate at Marton, under the will of Richard Heber.

The last-named Reginald Heber, afterwards Lord Bishop of Calcutta, died in the year 1826, leaving two daughters, namely, Emily Heber and Harriet Sarah Heber, him surviving.

At the death of Richard Heber, the third devisee for life

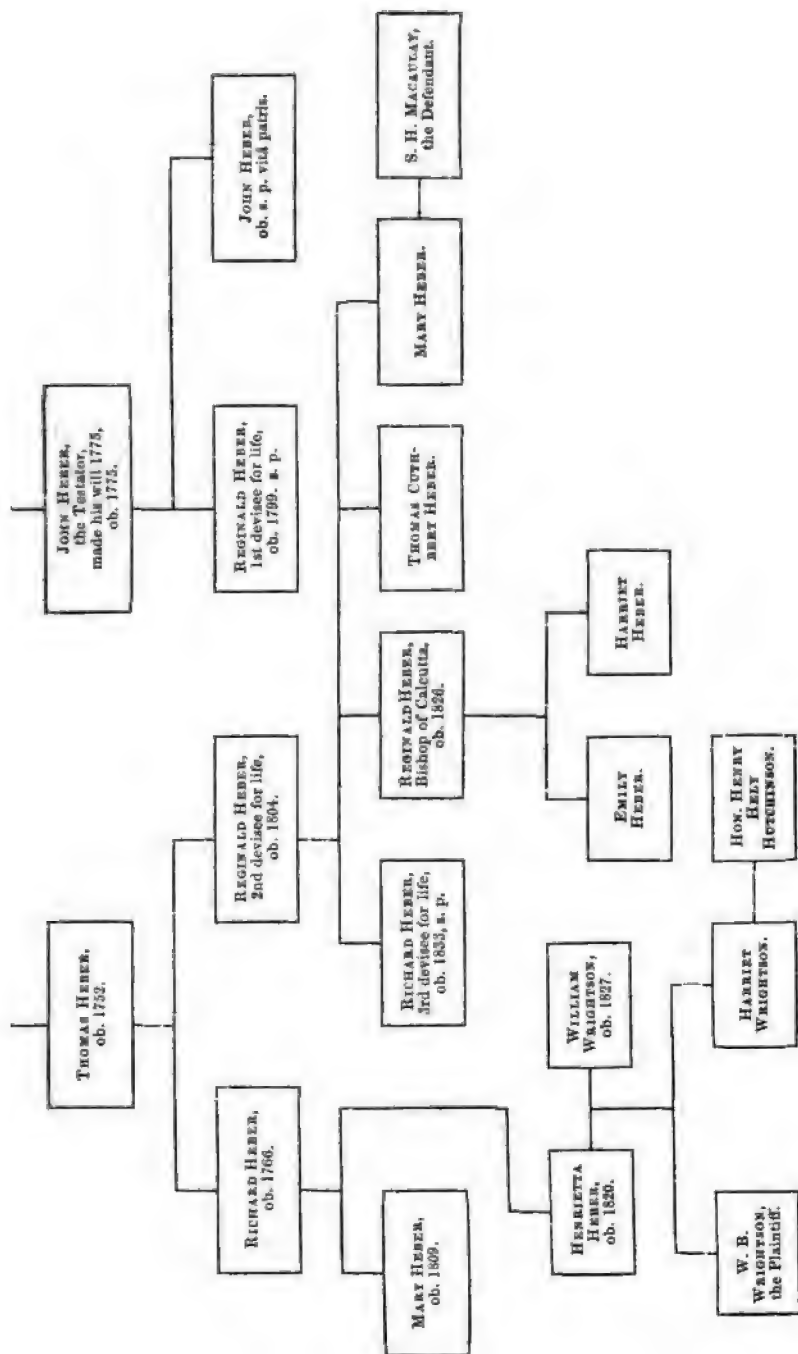
1845.
 WRIGHTSON
 v.
 MACAULAY.

under the will of the Rev. John Heber, and the then owner in fee of the ancient family estate at Marton, there was no male heir in possession of and lawfully entitled for the time being unto the said ancient estate at Marton; but the defendant Mary Macaulay (formerly Mary Heber) became entitled to such estate. At that time, Emily Heber and Harriet Sarah Heber were the nearest relations of the Rev. John Heber then bearing the name of Heber, and would have been the co-heiresses-at-law of the Rev. John Heber, and of his son Reginald Heber, if the female line of Richard, the eldest son of Thomas Heber, had failed.

William Battie Wrightson, as the eldest son and heir-at-law of his mother, formerly Henrietta Heber, and the Honourable Henry Hely Hutchinson and Harriet his wife, in right of the said Harriet, as the devisee of Mary Heber, claim to be entitled to the said freehold estates at Buckden, in right of the said Mary and Henrietta Heber respectively, who were the co-heiresses of Reginald Heber, and also of the testator John Heber.

There being various equitable claims affecting the estates so devised by the Rev. John Heber, a suit has been instituted, among other purposes, to ascertain the rights and interests of the different parties in these estates.

The questions for the opinion of the Court are :—1st, whether the ultimate limitation in the will of the Rev. John Heber, to the right heirs of the testator, being of the name of Heber, vested, at the testator's death, in his son Reginald Heber. 2nd, If it did not so vest, whether that ultimate limitation took effect at the death of Richard Heber, the third devisee for life. 3rd, Whether, at the death of the said Richard Heber, the said William Battie Wrightson, and the Honourable Henry Hely Hutchinson and Harriet his wife, or what other person or persons, became entitled to the possession of the estates and hereditaments so devised by the said Rev. John Heber.



1845.
 WRIGHTSON
 v.
 MACAULAY.

Malins, for the plaintiff.—The plaintiff contends, either, 1st, that the ultimate limitation to the right heirs of John Heber, being of the name of Heber, vested at the testator's death in his son Reginald; or, 2nd, that it was kept in suspense as a contingent reversion, until the determination of the particular estates by the death of Richard Heber in 1833, and if so, that it failed altogether, because at that time there was no *heir general* who bore the name of Heber; and that the estate then vested in the person who then bore the character of heir-at-law of the testator.

1. It is an established rule of construction, that the courts favour the vesting of estates at the earliest possible moment. And in this case there is nothing to shew a contrary intention, to keep the estate in suspense, except in order that it might vest from time to time in the heir bearing a particular name. But the law of England knows of no such descent. In the case of an estate in fee simple, it is contrary to law that there should be a descent to a particular sex, still less to a particular name. It will be said, however, that the right heirs of the name of Heber take as *purchasers*. If these be words of purchase, the case is still stronger in favour of the plaintiff; because, in order to take as purchaser, the party must answer *the whole description*. Assuming that at the death of the testator the estate vested in Reginald Heber, he would take by descent, by his preferable title as heir; but it is immaterial whether he took by descent or by purchase, because the plaintiff is his heir as well as that of the testator. The doctrine as to the descent of a reversion is stated in *Goodright v. Serle* (a):—where the testator creates particular estates, leaving the ultimate reversion undisposed of, the testator himself is deemed the purchaser of the reversion, and it descends to his heir. Mr. Fearne (b) lays down

(a) 2 Wils. 29.

(b) Cont. Rem. 561.

the same rule; which was confirmed also in *Doe d. Andrew v. Hutton* (a) and *Goodtitle v. White* (b). It is clear on these authorities, that, the testator being the purchaser of the reversion, the descent is to be traced from him. But even if Reginald the son took by purchase, the plaintiff traces his descent from him, and is equally entitled. The course of descent, therefore, in this case is as follows :—This reversion descended, first, to Reginald Heber the son, who died intestate as to this estate; then to the persons who then became the heirs of the testator, viz. the two daughters of Richard Heber (the son of Thomas), Mary Heber and Henrietta Wrightson, from the survivor of whom it descended to her son, the plaintiff. There are ample authorities to shew that it could not go on in a course of descent to persons bearing the name of Heber; but it is unnecessary to refer to them, because, after the death of Reginald, the heirs did not bear that name. The defendant founds his claim upon the will of Richard Heber, who died in 1833; but he was not *heir*, because the elder branch of the family was then in existence. Mrs. Macaulay could take nothing under the express limitations in the will of John Heber, because she was neither heir nor of the name of Heber. She seeks, therefore, to claim under Richard Heber, as the nearest relative of the testator *bearing that name*. It has often been attempted to carry estates to persons of a particular sex or name, to the exclusion of heirs general, but in vain; as in *Goodtitle v. Pugh* (c), commented on by Sir William Grant in *Cholmondeley v. Clinton* (d). In giving the estate to the *right heir*, you cannot exclude the person who is properly and strictly the *heir*. The “right heir” is a person well known to and designated by the law. This is only following the

1845.
 WRIGHTSON
 v.
 MACAULAY.

(a) 3 Bos. & P. 643.

(b) 15 East, 174.

(c) *Fearne's Cont. Rem., App.,*

573; reversed in Dom. Proc., 3

Bro. P. C. 459; 2 Meriv. 348, n.

(d) 2 Meriv. 348.

1845.
 WRIGHTSON
 v.
 MACAULAY.

older authorities : see *Counden v. Clerke* (a) ; Co. Litt. 27. a. In a limitation to heirs male, in a deed, the law rejects the word " male," because it knows no such descent ; though, in a will, in furtherance of the testator's intention, it supplies the words " of the body ;" and the authorities cited shew conclusively, that, with respect to a fee simple, the law knows no such descent as to persons of a particular name, and that notwithstanding such a limitation, the lands descend to the heir general. It is clear also, that, where the estate may be either contingent or vested, the law favours its being vested, and the vesting of it at the earliest possible time. Thus, in *Doe v. Maxey* (b), where the testator devised his real estate, except at S., to the head of his family for life, then to several of the junior branches in succession for life, with remainder to his first and other sons in tail male, with remainder to his own right heirs, and then devised his estate at S. to each of the same devisees, but in a different order of succession, for life, with remainders to their first and other sons in tail male, and then directed that, " for default of such issue," it should go " to such person and persons, and for such estate and estates, as should *at that time*, and from time to time afterwards, be entitled to the rest of his real estate under his will ; it was held, that the ultimate remainder in fee in the estate at S. nevertheless vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency till the death of the last tenant for life without issue male. So, where the devise was to certain persons for life, and after the decease of the survivor to the *male heir-at-law* of the testator in fee, it was held that the fee vested at the testator's death in the person who was then his male heir-at-law : *Doe d. Pilkington v. Spratt* (c). So, where the ultimate remainder in fee, after the determination of the particular estates,

(a) Moor, 860 ; Hob. 39. (b) 12 East, 589. (c) 5 B. & Ald. 731.

was devised to such person bearing the surname of Hake as should be the male relation nearest in blood to the last devisee for life, it was held that it vested in interest on the death of the testatrix; *Stert v. Platel* (a). *Doe d. Garner v. Lawson* (b) and *Boydell v. Golightly* (c) are authorities to the same effect. The old doctrine about the ultimate reversion remaining in gremio legis is altogether exploded: see *Fearne*, Cont. Rem. 352. If, therefore, Richard Heber took as a purchaser, this reversion must all along have been in the heir-at-law; and, inasmuch as all the estates given by this will have expired by the death of Richard, the case is now the same as if the testator had died altogether intestate. On this view of the case, therefore, the plaintiff is clearly entitled.

But, secondly, assuming that this was a contingent remainder, kept in suspense until the determination of the particular estates, it was a limitation to take effect *by purchase*, and has failed, because, upon the death of Richard Heber, there was nobody in existence who fulfilled the whole description, of right heir *and* being of the name of Heber. This rule of law has been relaxed in one instance only—as to the taking an *estate tail* by purchase, where the party is male or female, but not also heir, in order to effectuate the intention of the Statute de Donis; namely, that the estate tail may vest in the heir of a particular sex, although he be not heir general; that is, where he would take the estate tail by descent, he may also take by purchase: *Wills v. Palmer* (d), *Goodtitle v. Burtenshaw* (e).

On one or other of these grounds, then, the plaintiff contends, that the first question submitted to the Court by the Vice-Chancellor is to be answered in the affirmative, the second in the negative, and the third in the affirmative.

(a) 5 Bing. N. C. 434.

(b) 3 East, 278.

(c) 7 Jurist, 53.

(d) 5 Burr. 2615; 1 W. Bla. 687.

(e) *Fearne*, Cont. Rem., App., 570.

1845.
 WRIGHTSON
 v.
 MACAULAY.

James Parker, contra.—First, this estate did not vest on the death of the testator, but was suspended until the ultimate limitation took effect on the death of Richard Heber. Secondly, upon his death, the parties who became entitled were the personæ designatæ, the right heirs of the name of Heber ;—not construing the will technically, but according to the intention of the testator. All the rules quoted on the other side are rules of *construction*, not of *law* ; by which the courts are not so strictly bound, as to be compelled to defeat a clear intention to the contrary expressed in the will. Such is the rule as to the vesting of estates, and the rule as to whom the testator points out by a particular designation in the will. Looking broadly at the scheme of this will, the Court can entertain no doubt as to the testator's intention. He first selects his son Reginald, and gives him an estate for life, with a contingent remainder in fee to his daughters : then the next line he takes up is that of his nephew Reginald, and his descendants. This exhausts all towards whom he had any particular favour. Then comes a devise to the male heir in possession of the Marton estate, and then the devise to the right heirs bearing the name of Heber. Thus *four* different lines are pointed out, through which the property is to devolve in succession. But if the estates are all held to vest on the testator's death, there will be *two* lines only instead of four, and all his intention will be disappointed. If the limitation to the right heir of the name of Heber vests on his death, so does the limitation to the male heir in possession of Marton : and so the estate stood limited to Reginald the son for life ; then to Reginald the nephew for life ; then to Richard for life, and to his issue in tail ; with remainder again to Reginald the nephew for life, and to his issue in tail ; with the ultimate limitation in fee to his own son Reginald :—which could never have been his meaning. The limitation, therefore, to the male heir bearing the name of Heber must have reference to the period of the

ultimate failure of issue. It is introduced by words of contingency, "for default of a male heir being in possession of the estate at Marton," &c. And the expression "*male heir*" shews that he did not use the word "heir" in its strict legal or technical sense. It would surely be a strange conclusion, that the ultimate limitation vests, while an anterior one is held in contingency. It is doing violence to the language and general scheme of the will, which refers expressly to a future period, to construe the estate as vested at the testator's death. The words "his, her, or their heirs and assigns" shew that he is speaking of a future period, and of persons uncertain both in sex and number. He knew he had an eldest son and heir, and could not so designate him. Similar considerations led the Vice-Chancellor of England, in *Minter v. Wraith* (a), to apply the ultimate trust of a will, in favour of the personal representatives of the testator, to those who should be such at the death of a devisee for life. Here the whole will indicates the testator's intention that the estates should not vest at all until they vested in possession. The gift to the daughters of his son Reginald is of a *contingent* estate in fee. Every subsequent limitation, therefore, which is either alternative with or in defeasance of this, must necessarily be contingent also: Fearne Cont. Rem. 225, referring to *Loddington v. Kime* (b). That is one clear indication of the intention of the testator as to the period of vesting. Again, the limitation to the male heir must necessarily be contingent, from the uncertainty of ascertaining the person; and so also should the construction be as to the ultimate limitation to the right heirs. The authorities which have been cited as to the vesting of estates at the earliest possible period are not disputed; but it is a rule of construction only, not a rule of law so stringent as it has been represented. In *Couden v. Clerke*, that rule was not

1845.
 WRIGHTSON
 v.
 MACAULAY.

(a) 13 Sim. 52.

(b) 1 Salk. 224; 1 Ld. Raym. 203.

1845.
 WRIGHTSON
 v.
 MACAULAY.

applied at all. No question could have arisen in that case between the brothers and daughters of the testator, if the will were to be construed as is contended for here, and the parties pointed out as "right heirs male and posterity of me and my name for ever" were to be ascertained at the time of the testator's death. In *Periman v. Pierce* (a), the testator, having issue by his first wife three daughters, by his second wife two daughters, and by his third wife three daughters and a son, devised his lands to the youngest daughter for life, then to the son in tail, then to two other daughters for life, with remainder "propinquo sanguinitatis" of the devisor for ever. There it is clear the person to fill this character could have been ascertained at the testator's death; yet it was held that, when the son died without issue, the remainder in fee vested in the son of the testator's eldest daughter born after his death. In *Doe v. Macey*; no intention was shewn to suspend the vesting of the estate. In *Doe v. Lawson*, the parties to take were the persons who were next of kin to the testator at his death. So, in *Boydell v. Golightly*, there was nothing to shew that the testator meant the ultimate limitation to remain in suspense, except merely the provisions for the maintenance of his son. *Stert v. Platel* turned on the particular words of the devise; and *Tindal*, C. J., there admits, that the rule may be controlled by a plain intention to the contrary. There are several cases in equity referring to personal estate, shewing that, in circumstances like these, the vesting of the interest is suspended; and the rule of construction, being founded on the intention, must be the same in both cases: *Jones v. Colbeck* (b), *Butler v. Bushnell* (c). It is therefore merely a question of construction; and if the intention of the testator will be best consulted by postponing the vesting of the estate, the Court will do so.

(a) *Bridgman*, 14; Co. Litt.
 116, n.

(b) 8 Ves. 38.

(c) 3 Myl. & K. 232.

1845.
 WRIGHTSON
 v.
 MACAULAY.

in the way of carrying the intention of the testator into effect, if you can ascertain it. Here he has pointed out a particular character to be filled by the objects of his bounty at a remote period: the daughters of Bishop Heber fill that character, and thus the devise has not, as is contended, failed altogether. [*Alderson*, B.—The testator's intention certainly was that both the estates should go together. By the events which have happened, they will do so, if Mr. *Malins*' construction be right: we might, therefore, by adopting your view, be breaking his intention.] If he had meant this estate to go along with the settlement, and according to the same limitations, he might have said so in very few words.

Mulins, in reply, was desired to confine himself to the first question, as to the period when the estate vested.—The intention of the testator is no doubt to be regarded, but so far only as is consistent with the rules of law, and the established principles of construction: and here, even if his intention were clearly shewn to carry this estate down to the remotest posterity in the name of Heber, it cannot be carried into effect consistently with the rules of law. You are to ascertain at the death of the testator, if possible, when the fee simple is vested, in order that the rights of families may be ascertained, and property securely dealt with: per *Dampier*, J., in *Driver v. Frank* (a). Look at the consequences of the opposite construction. In this case, in consequence of the speedy failure of issue, the particular estates expired at the end of sixty years; but during that time the property would be useless for the purpose of sale, settlement, or devise. And there are no stronger words here than in every one of the cases, viz. that it is a limitation after the failure of certain issue. [*Parke*, B.—There is nothing more, except the words “his, her, or

(a) 3 M. & Sel. 25.

1845.
WRIGHTSON
v.
MACAULAY.

that kind of evidence of intention which is said to amount to "demonstration plain." That is not so here, and therefore the rule of law prevails.

ALDERSON, B.—I am of the same opinion, that the first question ought to be answered in the affirmative, and that we should proceed upon the general rule of law, that the party to take should be determined, if possible, at the death of the testator, and that the estate should then vest in interest. That is a sound and wise rule: the inconveniences of departing from it have been properly pointed out by Mr. *Malins*. The rule, therefore, is to be observed, unless there be clear evidence of an intention to the contrary; and there is none such here: therefore we ought to abide by the rule. As to the second question, we answer that this limitation did not take effect at the death of Richard Heber, because there was at that time no person who filled the double description in the will; and if so, the estate was undisposed of, and descended to the heir-at-law of the testator, and from him to the plaintiff and Mrs. Hutchinson.

PLATT, B., concurred.

A certificate was afterwards sent to the Vice-Chancellor in accordance with this judgment.

1845.

RYLATT v. MARFLEET.

June 2.

TRESPASS for breaking and entering a close of the plaintiff's, in the parish of Boothby Graffoe, in the county of Lincoln, and carrying away large quantities of stones.

Plea, that by an inclosure act of the 11 Geo. 3, for dividing and inclosing certain open and common fields within the parish and manor of Boothby Graffoe, it was enacted, that certain commissioners therein mentioned should set out and allot not more than two acres of the land and ground intended to be divided and inclosed, and in such convenient place near the town of Boothby Graffoe as they should think most proper, for getting of stone and gravel, *and other materials*, for the repairs of the highways and public and private roads to be set out by virtue of the said act, *and for the use of the inhabitants* of the said parish of Boothby Graffoe; that the said close in which &c., was part of the open and common fields within the said manor and parish of Boothby Graffoe, and that the commissioners assigned the said close in which &c., for getting of stone and other materials for the repair of the highways set out by virtue of the act, and for the use of the inhabitants of Boothby Graffoe; and that the defendant, as an inhabitant of Boothby Graffoe, carried away the stone in the declaration mentioned, for the use of him the said defendant, &c. The replication stated, in substance, that the act of Parliament recited, as the fact was, that there were in the manor and parish of Boothby Graffoe several open and common fields, containing 1600 acres, which were the same fields as in the plea mentioned; that Lord Melbourne was lord of the manor; that the Rev. R. Burne was entitled to certain glebe lands in right of common and other interests within the said open and common fields; that it was thereby enacted, that the commissioners, after setting out private roads and ways, and land for getting materials for the repair thereof, and

Where an inclosure act directed that the commissioners should set out and allot a certain portion of the common lands for the getting of stone, gravel, and other materials, for the repairs of the highways and other roads to be set out under the act, and for the use of the inhabitants within the parish: — *Held*, that this did not authorize the inhabitants to take such materials for their private purposes, but only for the repairs of the roads.

1845.
 RYLATT
 v.
 MARFLEET.

for the use of the inhabitants of the said parish, should allot to the said R. Burne and his successors such parcels of the said fields as should be equal in value to all the glebe lands and rights of common, &c.; and that the commissioners should allot the residue of the said fields to the several persons who, at the time of making such inclosure, should be entitled to lands and rights of common therein, in lieu of such interests and rights of common. The replication then set out the substance of various provisions of the act of Parliament, relating to the fencing of the lands, the repair of the ways over the same, and the like, and then averred, that neither the inhabitants of Boothby Graffoe, nor any person having rights of common over the open and common fields, had, before the passing of the act, any right to get stones upon any part of the open or common fields for the purpose of being burnt into lime, to be used for manure, and that the said defendant, at the said times when &c., dug the said stones in the said close for the purpose of their being burnt into lime for manure.

General demurrer, and joinder.—The point stated for argument on the part of the defendant was, that there was nothing stated in the plea to abridge the right of the inhabitants of Boothby Graffoe to get stone for their use in the locus in quo.

Waddington, in support of the demurrer.—The defendant is entitled to the judgment of the Court; for the reasonable construction of this act of Parliament is, that stone may be taken, not only for the repair of the roads, but also for the bonâ fide use of the inhabitants of the parish generally, although probably they could not take it to make a profit of it by sale. [*Pollock*, C. B.—Do you contend that one of the inhabitants might build a mansion with the stone?] The argument must go to that extent. [*Rolfe*, B.—The words of the act are, “stone, gravel, and other materials.” Can you say that stones taken for manure

are *materials*? *Alderson*, B.—May the inhabitants take timber? because that is a material: if not, it would seem to be plain, that the words must be construed to mean materials for making roads.]

1845.
RYLATT
v.
MARFLEET.

Addison, contra, was not heard.

POLLOCK, C. B.—I think the plain and obvious meaning of this act of Parliament is, that materials for the repair of the roads within the parish can alone be taken by the inhabitants. There will be, therefore, judgment for the plaintiff.

ALDERSON, B., *ROLFE*, B., and *PLATT*, B., concurred.

Judgment for the plaintiff.

COOK v. SWIFT.

June 4.

DEBT for a penalty on the statute 5 Vict. c. cxii, (local and personal, public) (a); venue, Lancashire. The first count of the declaration charged, that the defendant, after Blackburn, directed, that every male person of the full age of twenty-one years, residing in or within three miles of the township, and either being rated to the poor-rate in the annual sum of £30 or upwards, or seised or possessed of lands within the township of the annual value of £30 for the estate therein mentioned, should be a commissioner for carrying the act into execution; and subjected to a penalty of £50, to be sued for in an action of debt, &c., any person who should act as such without being duly qualified; and enacted, that, in such action, the proof of qualification should lie on the defendant:—*Held*, that a declaration against a party for this penalty, which alleged generally that he acted although he was not at the time duly qualified, was sufficient, and that it need not state the particulars of his disqualification.

Since the rule of H. T., 4 Will. 4, s. 8, a declaration for a penalty given by statute, which makes the action local, need not aver that the penal act was done in the particular county, if that county be the venue in the margin of the declaration.

(a) "An Act for improving the Streets and public Places, and erecting a Town-hall, and improving the Markets, in the Township of Blackburn, in the County Palatine of Lancaster."

1845.

COOK
v.
SWIFT.

the passing of the act, acted as a commissioner in the execution of the act, although he was not at the time rated to the relief of the poor in the annual sum of £30 or upwards, &c.

The second count alleged, that, after the passing of the act, to wit, on the 1st day of August, 1844, the defendant acted as a commissioner in the execution of the said act, although he was not, at the time of such acting as such commissioner, duly qualified to act as a commissioner in the execution of the said act, contrary to the statute, whereby an action had accrued, &c.

The defendant pleaded to the first count, *nunquam indubitatus*; and specially demurred to the second count, on the ground that it ought to have shewn in what respect and on what ground the defendant was not duly qualified to act as a commissioner, there being several grounds of disqualification mentioned in the statute; that the count was therefore double; and that, this being a local action, the count did not sufficiently allege an offence committed within the county of Lancaster. Joinder in demurrer.

Martin, in support of the demurrer.—This declaration is bad for the causes assigned. The statute in question, the 4 & 5 Vict. c. cxii, enacts, by the 9th section, “that every male person of the age of twenty-one years, being a resident within the said town of Blackburn, or within three miles of any part of the boundary thereof, and either being rated to the rate made for the relief of the poor of the same township in the annual sum of £30 or upwards, or being seised or possessed, or in the enjoyment for his own use of the rents and profits, of lands or hereditaments within the said township of the annual value of £30, for an estate not less than a life in being, or for a term of years of which not less than twenty-one years shall be unexpired, and whether determinable on a life or lives or not, shall be a commissioner for carrying this act into execution.” The

18th section provides, that, at the meeting of the commissioners at which any person shall first attend as one of such commissioners, he shall make and subscribe the declaration therein mentioned. Then the 19th, on which this action is founded, enacts, that, if any person shall act as a commissioner, at the time he shall so act not being duly qualified, or before he shall have made or subscribed such declaration as aforesaid, or after having become disqualified, he shall for every such offence forfeit the sum of £50, to be recovered, with costs, by action of debt or on the case, &c.; and in every action for the recovery of such penalty, the person so sued shall prove that he was qualified, and had made and subscribed the declaration aforesaid, or he shall pay the said penalty and costs, without any other proof on the part of the plaintiff than that such person has acted as a commissioner in the execution of the act. It will be seen, therefore, that there are three several things which must concur, in order to qualify the party to act as a commissioner, the absence of any one of which renders him liable to the penalty; viz. that he be a male person of the age of twenty-one,—that he be resident in or within three miles of the borough,—and that he be assessed to the poor-rate to a certain amount, or in possession of an estate of a certain value. This count, therefore, amounts to saying that the defendant is liable to the penalty, not being *any one* of these three things, and is in effect a *treble* count. The plaintiff obtains the advantage of recovering in the action, in case of any one of these three requisites not being fulfilled. He should have given the defendant information in respect of which of them he was proceeding. Mr. Stephen lays it down (a), as a general rule, that “pleadings must not be double;” and that “this rule applies both to the declaration and subsequent pleadings. Its meaning with respect to the former is, that

1845.
 COOK
 v.
 SWIFT.

(a) Stephen on Pleading, 4th edit., 279.

1845.

COOK
v.
SWIFT.

the declaration must not, in support of a single demand, allege several distinct matters by any one of which that demand is sufficiently supported." [Alderson, B.—The onus of proof is on the defendant: he must be prepared at all points. Parke, B.—The penalty is given for the not being "duly qualified." Is it not sufficient for the plaintiff to allege the case according to the words of the act,—especially as the onus is thrown on the defendant to prove his qualification?] That means, in answer to a declaration properly framed. [Alderson, B.—What benefit would you obtain by so limiting the declaration?] The proof would be confined to the disqualification alleged. [Alderson, B.—But that is what the act says shall not be, when it imposes the burthen of proof on the defendant.] It only means that the defendant shall be bound to disprove that which is properly averred. That provision applies to the *proof*; it has nothing to do with the pleadings. Surely it would be a bad declaration to say, that the defendant acted, being under twenty-one, *or* not resident within the limited distance, *or* not rated, &c.; and that is what this declaration in effect says. It is in effect putting all these incapacities in the alternative. [Parke, B.—The question is, whether the act does not put upon the defendant the burthen of proof as to the entire qualification, and give the plaintiff this general form of count.]

Again, the count is defective for not shewing that the penal act was done within the county of Lancaster. [Parke, B.—The county in the margin supplies that.] The rule of Hilary Term, 4 Will. 4, s. 8, appears not to be applicable to cases where it is necessary by statute to aver that the act was done in the county. The rule is, that "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent

pleading." But here the statement of place is a material averment. [*Parke, B.*—It is *venue*. The statute of Elizabeth is satisfied, if the act be averred to have been done in the county; then the rule makes the statement of venue in the margin equivalent to that.]

1845.
Cook
v.
Swift.

Cowling, in support of the declaration, was stopped by the Court, who gave the defendant leave to amend by withdrawing the demurrer, on payment of costs; otherwise

Judgment for the plaintiff.

PLAYFAIR v. MUSGROVE and Another.

May 27.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and continuing therein for a long space of time, to wit, three months.

Pleas, 1st, not guilty; 2ndly, that the dwelling-house in which &c. was not the dwelling-house of the plaintiff modo et formâ; 3rdly, a justification under a writ of fieri facias directed to the defendants as sheriff of Middlesex, under which they entered the said dwelling-house, and seized and took in execution a certain lease or instrument of demise in writing of the plaintiff of the said dwelling-house in which &c., and then being therein, and of and by which the plaintiff held and was then possessed, as in the declaration mentioned, for a cer-

Trespass against the sheriff for breaking and entering the plaintiff dwelling-house. Plea, that the defendant entered under a fi. fa., and seized and took in execution a lease of the plaintiff's of the said dwelling-house, under which the plaintiff held and was possessed of the same, and, before the return of the writ,

sold the term, and continued in possession of the house for the further execution of the writ. The plaintiff new assigned that the defendant continued in possession an unreasonable time after he had seized and taken in execution and sold the lease. To this new assignment the defendant pleaded, that the dwelling-house in the new assignment mentioned was not, at the time of the committing of the trespasses newly assigned, the dwelling-house of the plaintiff. At the trial, it appeared that the sheriff had sold the lease by auction, but that no assignment had been executed by him to the vendee:—*Held*, that the seizure did not vest the term in the sheriff, but that it remained in the debtor until the sheriff executed an assignment to the purchaser; and that, whether the word "sold" imported an actual assignment or not, the sheriff could not justify remaining an unreasonable time in the house; and therefore, that the plaintiff was entitled to have the verdict entered for him on the plea to the new assignment.

1845.
PLAYFAIR
v.
MUSGROVE.

tain term of years therein, that is to say, of ten years and three-quarters wanting seven days, then and at and after the time of the committing the said trespasses, unexpired therein; and afterwards, and before the return of the said writ, sold the same, and the plaintiff's interest in the said term, and continued in possession of the said dwelling-house, as in the declaration mentioned, in and for the further execution of the said writ, and so committed the said supposed trespasses in the declaration mentioned.

The plaintiff joined issue on the 1st and 2nd pleas, and to the 3rd new assigned, that, after the defendants had seized and taken in execution and sold the said lease in the plea mentioned, and after the expiration of a reasonable time for such seizing, taking in execution, and selling, and for the completion of the purpose for which the defendants broke and entered the said dwelling-house of the said plaintiff, the defendants did not depart from and quit the dwelling-house of the plaintiff; but, on the contrary thereof, the defendants, on the several days and times in the declaration mentioned, the same being after the defendants had seized and taken in execution and sold as aforesaid, and after the expiration of such reasonable time as aforesaid, broke and entered the said dwelling-house, and stayed and continued therein for a long space of time, to wit, three months.

To this new assignment the defendants pleaded, 1st, not guilty; 2ndly, that the dwelling-house in the new assignment mentioned was not, at the said times of the committing of the several alleged trespasses above newly assigned, or any of them, or any part thereof, the dwelling-house of the plaintiff, *modo et formâ*: upon which issue was joined.

At the trial before *Pollock*, C. B., at the Middlesex Sitings after last Michaelmas Term, it appeared that the defendants had entered the plaintiff's dwelling-house under a writ of fieri facias for the purpose of executing the same, and seized, amongst other things, a lease for years of the

dwelling-house in question, and sold the plaintiff's interest therein by auction; but no assignment to the purchaser was made and executed by them. The jury found all the issues in favour of the plaintiff, except that on the second plea to the new assignment, on which, under the direction of the learned Judge, they found a verdict for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him on that issue. *Humfrey* having, in Hilary Term last, obtained a rule accordingly,

1845.
 PLAYFAIR
 v.
 MUSGROVE.

Jervis and *Kennedy* now shewed cause.—The question here is, whether a party who has ceased to have any legal interest in the house can be said to have possession so as to be entitled to maintain trespass, and whether he can treat the sheriff as a trespasser for continuing in the house afterwards. The seizure and sale of a term of years by the sheriff, under a writ of fieri facias, divests the right of the debtor and vests it in the sheriff, until he has executed an assignment to the purchaser and completed his title to the property, or until the execution is set aside, in which case the right of the execution debtor is revived. The debtor ceases by the seizure and sale to have any interest in the house; and the sheriff, immediately on the knocking down of the hammer, might turn him out of possession, and put the vendee in. *Buller*, J., appears to have been of that opinion in *Taylor v. Cole* (a). He there says, "In what cases the sheriff would be justified in expelling the party under a fieri facias, I give no opinion; but it seems to me, that, where there is a tenant in possession, and the execution is against the landlord, whose term is to be sold, the tenant cannot be turned out of possession: but that is very different from the present case, where the debtor himself is in possession. In such case I incline to think that the sheriff may turn him out of possession." The doctrine

(a) 3 T. R. 292.

1845.
 PLAYFAIR
 v.
 MUSGROVE.

there laid down is correct, and is precisely applicable to the present case. [*Rolfe*, B.—That is only a dictum of *Buller*, J., which was not necessary to the decision of the case.] Certainly it is so; but it is the only authority directly in point, and it has never been overruled. This is analogous to the case of personal chattels, which are deemed, after seizure, to be in the custody of the law, so that the sheriff may maintain an action for any injury done to them: *Giles v. Grover* (a). But it may be admitted that, for some purposes, until sale the property remains in the debtor. The plaintiff here admits the seizure and sale, but says that the defendants remained in possession an unreasonable time. The defendants say, it was not the plaintiff's house when the trespasses newly assigned were committed. The plaintiff is in this difficulty: he admits that the sheriff seized, and took, and sold the house. Now, if the word "sold" means a perfect assignment, the defendants were then in possession under the assignee, and the property was out of the plaintiff: if an imperfect assignment, then the sheriff had a right to continue in possession until he had completed it. The debtor's interest is determined by the seizure under the execution, so as to take away his right to bring a possessory action, except as against a mere wrong-doer: *Taunton v. Costar* (b), *Butcher v. Butcher* (c). The only authority which bears expressly on the point is the dictum of *Buller*, J., in *Taylor v. Cole*; but that is a high authority, and appears to have been acquiesced in. It is the duty of the sheriff to sell the term in order to satisfy the execution; and if he sells the term and goes out of office, he must make the assignment afterwards: *Doe d. Stevens v. Donston* (d). Lord *Ellenborough*, C. J., there says:—"The sheriff, by the writ of *fi. fa.*, has an authority to sell, and, having once seized the goods in execution of the

(a) 9 Bing. 128; 2 M. & Scott,
197.

(b) 7 T. R. 431.

(c) 7 B. & C. 399.

(d) 1 B. & Ald. 230.

writ, he is bound, even after his general authority has ceased, to proceed to sell, and to do every act necessary to complete the sale." But in whom, from the time of the seizure and sale, is the property vested? It is not in the execution debtor, because it is taken from him. It is in the custody of the law—in the hands of the sheriff, until he executes the assignment. [*Alderson*, B.—If, by the assignment of the sheriff, the property passes from the execution debtor to the vendee, it shews that the sheriff is a mere instrument to convey the property, and in that case the house remains the house of the execution debtor until it becomes the house of the sheriff's vendee, by virtue of the assignment. That was the opinion of *Patteson*, J., as well as my own, in *Giles v. Grover*. If so, the issue on the second plea to the new assignment ought to be found for the plaintiff. *Pollock*, C. B.—If the argument of the defendants' counsel be right, the new assignment was demurrable, and the defendants should have demurred instead of traversing it.] In the allegation that the sheriff continued in possession an unreasonable time, there is involved a mixed question of law and fact, and it is by no means clear that the defendants could have demurred. The defendants had a right to shew that the assignment had not been made, and the sheriff had a right to continue in possession until it was made. [*Pollock*, C. B.—If that were so, a sheriff might continue in possession for any length of time, on the ground that he had not yet executed an assignment.] He would be liable in an action *on the case* for remaining there improperly, and beyond a reasonable time for that purpose, or for any abuse of the power which the law vests in him; but *trespass* is not maintainable. Where the party is a mere wrong-doer, the plaintiff is entitled to maintain trespass; but that cannot be so in the case of a sheriff, who is justified under the execution. He is obliged to enter the house, and to sell the property he finds there. It is clear he is not func-

1845.
 PLAYFAIR
 v.
 MUSGROVE.

1845.
 PLAYFAIR
 v.
 MUSGROVE.

tus officio at the end of the sale, as he has a further duty to perform, viz. to assign the property. [*Alderson*, B.—Where is the necessity for his remaining in the house to sell the term? *Platt*, B.—In *Rex v. Deane* (a), it was held that if a sheriff, on a fi. fa., sell a lease or term of a house, he cannot and must not put the person out of possession, and the vendee in; but the vendee must bring his ejectment.] It has been held that that applies only to a forcible expulsion. That case decided no more than *Newton v. Harland* (b), in which it was held, that where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him *by force*, in order to regain possession. And even there *Bosanquet*, J., says, “If a tenant hold over the land after the expiration of his term, he cannot treat the lessor, who enters peaceably, as a trespasser.”

Humfrey and *Peacock*, contra, were stopped by the Court.

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute, and that the plaintiff is entitled to the verdict on the second plea to the new assignment. The declaration is, in trespass for breaking and entering the plaintiff's dwelling-house, and continuing therein for the space of three months; and the third plea to that was, a justification by the defendants as sheriff of Middlesex under a fi. fa., under which the defendants entered the dwelling-house, and seized and took in execution a lease under which the plaintiff held and possessed the house for a term of years; and it alleged, that afterwards, and before the return of the writ, the defendants sold the term, and the plaintiff's interest in it, and continued in possession of the dwelling-house, as in the declaration mentioned, for the

(a) 2 Show. 85.

(b) 1 M. & Gr. 644; 1 Scott, N. R. 474.

further execution of the writ. To that plea there was a new assignment, that the defendants stayed in the house an unreasonable time after they had seized and taken in execution and *sold* the said lease. The second plea to that new assignment is, that, at the time of the committing of the trespasses newly assigned, the said dwelling-house was not the dwelling-house of the plaintiff. The question now is, whether the plaintiff or the defendants be entitled to the verdict on that plea; the fact being, that the lease was seized under the execution and sold by auction, but no assignment executed to the purchaser. Now it appears to me that the verdict ought to be entered for the plaintiff, whether the word "sold" means an actual assignment to the purchaser, or a mere inchoate act towards a transfer, to be afterwards perfected by an assignment. If it means an actual assignment, the sheriff was *functus officio* as soon as the assignment was made, and had no right on the premises afterwards, and by continuing there became a trespasser; and if, on the other hand, it is not to be understood as meaning an assignment, but as a mere inchoate act towards one, then beyond doubt the house was the house of the plaintiff, for the property remained in him. I think it is quite clear, that the term remains in the original lessee until an actual assignment by the sheriff; and I cannot at all accede to the suggestion in argument, that, on the seizure of a term of years, the term becomes vested in the sheriff until he executes an assignment of it to the purchaser. It may be, that things which pass by delivery are, for some purposes, vested in the sheriff by the act of seizure; but in the case of chattels real it is not so. I think, therefore, the rule ought to be made absolute.

ALDERSON, B.—I am of the same opinion. The plaintiff's complaint against the sheriff is, that having entered his dwelling-house under a writ of *feri facias*, and seized

1845.
PLAYFAIR
v.
MUSGROVE.

1845.
 PLAYFAIR
 v.
 MUSGROVE.

and sold the lease, he remained an unreasonable time afterwards in the house. The sheriff says, "The house the plaintiff speaks of is not the house of the plaintiff." The question, therefore, comes to this: was it, as against the sheriff, who, having remained an unreasonable time, had no right to be there, the plaintiff's house? If the sheriff had any property in the house, why did he say he did not remain an unreasonable time: why raise that question? The sheriff has a right to enter the house for the purpose of executing the writ, but he has no business there beyond a reasonable time for the execution of it. He has a right to seize the debtor's property, and to sell and assign it, but he is only the conduit-pipe to transfer the right of the debtor to the purchaser; and if so, the house remained the house of the plaintiff until it was legally transferred. And that is so in the case of goods; for in *Giles v. Grover*, my Brother *Patteson* says:—"That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment suspend the sale and execution." Perhaps the sheriff might, in this case, have justified remaining in possession as against the purchaser; but, supposing that by the word "sold" it is meant that he assigned the term, and that he had no right to remain as against the purchaser, it is clear he had no right to remain as against the plaintiff, who was in actual possession. I am disposed, however, to think that the word "sold" does not mean an actual assignment, and that the possession was still in the plaintiff. I therefore agree, that this issue should have been found for the plaintiff, and that the rule must be absolute.

ROLFE, B.—The sheriff has pleaded that he was justified in entering the plaintiff's dwelling-house by the writ of fieri facias; and that, before the return, he *sold* the lease, and the plaintiff's interest in the term, and con-

tinued in possession of the dwelling-house for the further execution of the writ. Now, the word "sold" seems to me to mean "*bargained and sold*;" for the law knows nothing of the sale of a chattel real, except by an instrument under seal; and the mere knocking it down at an auction is nothing more than making a contract to sell it. To that extent I go with the defendants' counsel. The plea is open to the objection that it does not shew to whom the premises were sold, and a special demurrer might have been had on that ground; but it is unnecessary to consider that point now. The sheriff, therefore, having sold and assigned the term, (for that seems to me to be the meaning of the plea), the plaintiff says, that, after he had so done, he remained on the premises an unreasonable time. The sheriff then says, in answer, that the house was not the house of the plaintiff. That, however, is not at all made out; for it is admitted on the pleadings, that the house was the plaintiff's until the sheriff commenced the execution of the writ. If there had been no goods in the house, the sheriff had only to sell the debtor's interest in the lease, and had no right to continue in the house beyond a reasonable time. The dictum of *Buller, J.*, in *Taylor v. Cole*, was unnecessary to the decision of that case; and it is not stated with much confidence. It is said it has never been overruled; but has it ever been acted on? It seems strange that, under a *fieri facias*, a sheriff should be able to execute an *habere facias possessionem*. I think the word "sold" must be understood to mean "*bargained and sold*;" that is, such an act as gives the purchaser a right to come into possession, and to enforce his right by ejectment.

PLATT, B.—I concur in thinking that the plaintiff was entitled to the verdict on this issue, and that the rule should be absolute.

Rule absolute.

1845.
 PLAYFAIR
 v.
 MUSGROVE.

1845.

June 6.

ECCLES and Another v. HARPER.

Where, on the first trial of a cause, the plaintiff obtains the verdict, and a rule is afterwards made absolute for a new trial, "the costs to abide the event;" and the defendant succeeds on the second trial, neither party is entitled to the costs of the rule for a new trial.

THIS was an action on a policy of assurance, on the first trial of which the plaintiffs obtained a verdict, which was subsequently set aside by the Court, and a new trial granted, "the costs to abide the event." On the second trial the defendant obtained a verdict. The Master, on the taxation, allowed the defendant the costs of the rule for the new trial. *Crompton* having obtained a rule to shew cause why the Master should not review his taxation,

Martin now shewed cause.—The party who ultimately succeeds on the new trial is entitled to the costs of the rule for a new trial. They follow the event, and go with the general costs of the cause. [*Alderson*, B.—How does it differ from the case where the new trial is granted on the ground of misdirection? There neither party gets the costs of the rule.] The party who eventually succeeds, and is therefore shewn to have been in the right, ought to be indemnified against either an unfounded claim or a wrong verdict. In *Pugh v. Kerr* (a), the Court laid down the rule thus:—"There is no doubt that the costs of all interlocutory proceedings in a cause, not otherwise provided for by the Court, are, according to the practice of the Court, costs in the cause." The present case comes within that general rule; this rule was an interlocutory proceeding, in which the defendant was successful, and the costs of which were not specially provided for. The successful party is entitled to the costs of the cause, not by the mere discretion of the Court, but by the statute of

(a) 6 M. & W. 20.

Gloucester. [*Alderson*, B.—A proceeding in the cause is something which makes the cause proceed; now a first trial, which fails, does not make the cause proceed; it does not appear on the record at all: therefore all the intermediate proceedings between the first and second trials are, as it were, wiped out of the cause. *Pollock*, C. B.—The “interlocutory proceedings” mentioned by the Court in *Pugh v. Kerr* mean proceedings in the cause. Now a motion for a new trial is not a proceeding in the cause; it throws it a stage back.] *Austen v. Gibbs* (a) shews, that where the costs are directed to abide the event, that means, as to the costs of the trial,—the event of the same party’s obtaining the verdict a second time. But the costs of the rule for a new trial stand on a different footing; and the question is, whether they ought not to follow the costs of the cause, in which the defendant ultimately succeeds. [*Alderson*, B.—If the rule is made absolute for a new trial simpliciter, as for misdirection, neither party has the costs of the rule. Here there is only the additional term annexed, that *the plaintiffs* shall have their costs of the first trial, only in case they succeed again. How can the addition of that term have the effect of giving *the defendant* any costs which it is admitted he could not have without it?]

1845.
ECCLES
v.
HARPER.

Crompton, in support of the rule, was not called on.

POLLOCK, C. B.—My Brother *Alderson* has just put the matter in a light which is irresistible. When you look at it on principle, it is clear the plaintiffs ought not to be called upon to pay the costs of coming to defend a verdict which they have obtained. It is admitted there is no direct authority upon the point; and that, where the rule is

(a) 8 T. R. 619.

1845.
 ECCLES
 v.
 HARPER.

made absolute simpliciter, there are no costs on either side. It is impossible to distinguish the two cases.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

June 6.

LAWRENCE v. CLARK.

In an action on a bill of exchange, to which the defendant pleaded a plea of fraud and covin—
Held, that a notice by the defendant to produce the bill, left in the letter-box of the office of the plaintiff's attorney in London at half-past eight o'clock on the evening before the cause was tried at the Middlesex Sittings, the plaintiff also being resident in London, was too late.

Held, also, that the plaintiff was not bound to produce the bill on the trial without notice.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange. Plea, that the acceptance was obtained by and through the fraud, covin, and misrepresentation of the drawer, and others in collusion with him, and that the bill was indorsed by him to the plaintiff without value or consideration. Replication, *de injuriâ*.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after Hilary Term (on the 19th of February), the defendant called a witness to prove the allegation of fraud contained in his plea, and being desirous of putting the bill into his hands, for the purpose of identifying it as the bill to which his evidence referred, called upon the plaintiff to produce it for that purpose, and insisted — that he was bound to do so without any notice to produce. — The plaintiff's counsel refused to produce it, and relied on *Read v. Gamble* (a) as an authority that he was not bound to do so without a notice to produce: and the learned judge so ruled. The defendant then proved the service, at the office of the plaintiff's attorney in London, (by putting it into the letter-box there), at half-past eight o'clock the evening before, of a notice to produce the bill on the trial. This notice was dated the 12th of February, and was intitled (by mistake) "In the Common Pleas." The Lord Chief Baron held, that this notice was too late; and the plaintiff had a verdict for the amount of the bill.

(a) 10 Ad. & E 597, n.

In Easter Term, *Petersdorff* obtained a rule nisi for a new trial, on the grounds, 1st, that the plaintiff ought to have produced the bill when called upon, without notice; 2ndly, if not, that the notice was sufficient.

1845.
LAWRENCE
v.
CLARK.

Jervis and *Wordsworth* now shewed cause.—As to the first point, *Read v. Gamble* is an express authority that a notice to produce was necessary in this case. Then as to the notice itself. In the first place, it was invalidated by the wrong title. It may be said that the error could not mislead; but in *Harvey v. Morgan* (a) an objection equally strict prevailed. There the action was by A. and B., as the assignees of C. and E., and a notice to produce, intituled “A. and B., assignees of C., D., and E.” was held insufficient, although the plaintiffs were in fact also assignees of C. and D. [*Platt*, B.—There it was intituled in a different cause. *Pollock*, C. B.—Suppose it had not been intituled in any court, or had been in the form of a letter?] In that case there would be no misdescription. [*Alderson*, B.—One does not know where we are to stop. Would the notice be bad if one of the names were spelled wrong? The question is, whether the party has had such a notice as to justify the Court in admitting the secondary evidence. At the time of the decision in *Harvey v. Morgan*, the courts were much more strict than now as to matters of this nature.]

Secondly, the notice was not served in such reasonable time before the trial as is necessary to let in the secondary evidence. The attorney was not bound to have the bill in his possession; it was not in issue in the cause. For the purpose of obtaining it, he would have to communicate with his client. In *Byrne v. Harvey* (b), a notice to produce a letter, in a town cause, served at the residence of the attorney, where also his office was, at half-past seven

(a) 2 Star. N. P. C. 17.

(b) 2 M. & Rob. 89.

1845.
 LAWRENCE
 v.
 CLARK.

o'clock on the evening before the trial, was held too late, on the ground that it did not give him sufficient time to communicate with his client and procure the document. This is a question which must in a great measure be left to the discretion of the presiding judge. [*Pollock*, C. B.—In *Atkins v. Meredith* (a), a notice to produce a tradesman's books, served on the plaintiff's attorney at seven o'clock of the evening before the trial, was held too late.] *Holt v. Miers* (b) is another authority to the same effect. [*Alderson*, B., referred to *George v. Thompson* (c).]

Petersdorff, contra.—This is a document which, although it was not directly put in issue in the cause, might reasonably be presumed to be in the possession of the attorney, for the purpose of conducting the cause. In the cases cited, the documents were tradesmen's books and letters,—such, therefore, as would be presumed to be in the possession of the client. [*Alderson*, B.—In *George v. Thompson*, the notice was to produce the agreement on which the action was brought.] In *Gibbons v. Powell* (d), a notice to produce the copy writ of summons served in the cause, given at the office of the defendant's attorney, at eight o'clock on the evening before the trial, to a clerk who had attended several summonses in the cause, was held in time. [*Alderson*, B.—That was in the nature of personal service on the attorney himself. If you serve notice so very late, you must at all events take care to make it perfect. The question is, whether, under all the circumstances, it was reasonable to expect the party to be able to produce the bill the next morning.]

But, secondly, the plaintiff was bound to produce the bill without notice. The proof which it was proposed to give on behalf of the defendant was not of a *secondary*

(a) 4 Dowl. P. C., 658.
 (b) 9 C. & P. 191.

(c) 4 Dowl. P. C., 656.
 (d) 9 C. & P. 634.

nature; he did not seek to give evidence of the *contents* of the bill, but only to prove certain collateral facts, which could not be made available, unless the witness could refer them to the bill on which the action was brought. [*Pollock*, C. B.—The difficulty is, how do you prove the *identity* but by the *contents*? *Rolfe*, B.—You want to shew, that when a certain writing took place on a certain piece of paper, certain concomitant circumstances attended it; but then you must shew it to be *the same* writing as that which is stated on the record. *Alderson*, B.—It is not as if the paper were lying before you at the time. Besides, the point is directly decided by *Read v. Gamble*.]

1845.
LAWRENCE
v.
CLARK.

ALDERSON, B.—I am of opinion that the Lord Chief Baron was quite right in excluding the evidence, on the ground that the notice to produce was too late. All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial. Here the notice was given at half-past eight o'clock the evening before, by being left at the office of the attorney. If the service had been half an hour later, it would have been a bad notice altogether for that night: but, as it is, it seems to me not to be a sufficient notice reasonably to enable the plaintiff to produce the bill at ten o'clock the next morning, when the cause was to be tried. Several cases have been cited, each of which depends upon its own circumstances. In the present case, I do not say, if the paper were lying before the attorney at the time, that the notice would not be sufficient; but it is not shewn whether it was in his or his client's possession. As to the other point, I am clearly of opinion that the evidence was not admissible without a notice to produce. It certainly is in the nature of secondary evidence, for the purpose of shewing the identity of the bill.

1845.
 LAWRENCE
 v.
 CLARK.

ROLFE, B.—I am of the same opinion. I should be glad if there were a rule established, that after a particular hour the notice should be considered too late; but as that is not so, each case must depend on the particular circumstances of it; and there is one circumstance here which is strong to shew that we should not extend the rule to let in this notice; namely, that it was dated the 12th of February, and not served until the 18th; the defendant, therefore, had all that time in which he might have served it. As to the rest of the case, I quite agree with my Brother *Alderson*.

PLATT, B., concurred.

POLLOCK, C. B.—I agree with my Brother *Alderson*, that each of these cases must depend on its individual circumstances, and what is sufficient in one case may not be so in another; and much, therefore, must be left to the discretion of the presiding judge, subject of course to correction by the Court.

Rule discharged.

June 9. UDAL and Others, Assignees of INNES, a Bankrupt, v.
 WALTON and Others.

A bankrupt is a competent witness, in an action by his assignees against parties claiming under an execution, to prove notice to them of a prior act of bankruptcy.

Semble, also, he is competent, since the 6 & 7 Vict. c. 85, to prove the petitioning creditor's debt, or act of bankruptcy, or any fact which tends to support the commission.

A notice by a bankrupt to an execution creditor, that "he had committed several acts of bankruptcy," is a sufficient notice of a prior act of bankruptcy, within the 2 & 3 Vict. c. 29: the notice need not state the nature or particulars of any act of bankruptcy.

THIS was an interpleader issue, directed to try the question whether certain goods belonged to the plaintiffs as assignees, as against and free from the defendants' execution. The declaration averred that they were the goods of the plaintiffs as assignees, which averment was traversed by the plea: and thereupon issue was joined. At the trial, before *Pollock*, C. B., at the last Gloucester Assizes, the

plaintiffs tendered the bankrupt, Innes, as a witness to prove the petitioning creditor's debt on which the fiat issued. It was objected for the defendants, that he was incompetent as a witness, on the ground of public policy, which did not permit a bankrupt to be a witness to prove the validity of the commission, and that the case was, therefore, not affected by Lord *Denman's* Act, 6 & 7 Vict. c. 85. The Lord Chief Baron admitted his evidence. It appeared that the defendants' execution had gone in just before the issuing of the fiat, and the question arose whether, at the time of the execution, they had notice of a prior act of bankruptcy committed by the bankrupt Innes, within the meaning of the statute 2 & 3 Vict. c. 29. A copy of a letter was proved by the bankrupt, which had been written by him to the defendants before the levying of the execution, and in which he informed them that "he had committed several acts of bankruptcy." The act of bankruptcy and the petitioning creditor's debt were subsequently proved by other evidence. The defendants' counsel contended that the bankrupt's letter was not a notice sufficiently specific to satisfy the statute, and that some particular act of bankruptcy ought to have been specified. The Lord Chief Baron thought the notice sufficient, and under his direction the plaintiffs had a verdict, leave being reserved to the defendants to move to enter a nonsuit.

1845.
UDAL
v.
WALTON.

Talfourd, Serjt., in Easter Term, obtained a rule nisi pursuant to the leave reserved, or for a new trial, on the ground of the inadmissibility of the bankrupt's evidence.

Keating and *Dowdeswell* now shewed cause.—First, the bankrupt was, by force of the statute 6 & 7 Vict. c. 85, if not independently of it, a competent witness for the purpose for which he was called, to prove the collateral fact of the existence and sufficiency of the petitioning creditor's debt. It is not necessary in this case to contend that he

1845.
UDAL
v.
WALTON.

is a competent witness for the purpose of directly supporting the commission, although, upon the authorities and upon principle, that proposition might be established; but inasmuch as his incompetency to prove a *collateral fact* certainly arises, not from any grounds of public policy, but, if at all, from his interest in the event, that supposed ground of incompetency has clearly been removed by the statute. But there is, in truth, no good reason for any such distinction. The only authority to sustain the proposition, that the inadmissibility of a bankrupt to support his commission was founded upon grounds of public policy, is a note in Mr. Starkie's Treatise on Evidence, Vol. 2, p. 191, (3rd edit.), where the author refers to Christian's Bankrupt Law, p. 444. [*Rolfe, B.*—What is the supposed public policy?] As it would seem, it is because bankruptcy was at one time considered a crime; but, even if that be so, the case is met by the express words of the statute. And in all the authorities, except in *Field v. Curtis (a)*, the incompetency is put upon the ground of interest: *Jourdain v. Lefevre (b)*, *Chapman v. Gardner (c)*, *Morgan v. Pryor (d)*. [*Alderson, B.*—A man is *competent* to prove his own crime, though not *compellable*.] The words of the 6 & 7 Vict. c. 85, s. 1, are so comprehensive as to include every case of incompetency, whether from crime or interest, except those expressly excluded by the proviso. And it is observable that an exception is introduced to exclude the case of husband and wife, although undoubtedly they *were* inadmissible as witnesses against each other on the ground of public policy. It is impossible to give full effect to the words of the statute, without including, for all purposes, the case of a bankrupt. Here, however, his evidence in truth applied, not to support the commission, but merely to prove a collateral fact, viz. the *notice* of the act of bankruptcy;

(a) 2 Stra. 829.

(b) 1 Esp. 66.

(c) 2 H. Bl. 279.

(d) 2 B. & C. 14; 3 D. & R. 215.

for the act of bankruptcy and the petitioning creditor's debt were proved by other evidence. For that purpose he clearly was competent. [*Pollock*, C. B.—The commission would be wholly untouched by that evidence; and then it resolves itself entirely into a case of interest—that he might by his evidence increase the estate.]

Secondly, the letter was a sufficient notice of the act of bankruptcy. [*Pollock*, C. B.—If that be not sufficient, it is difficult to see where we are to stop. If a general notice be not sufficient, what is? Must it state all the circumstances, as *where* the bankrupt was denied, and *to whom*?] If so, a pleader must be employed to draw it. Suppose the intent is to be inferred from a number of facts; are they all to be stated? And is its sufficiency to depend on the recipient's drawing a proper inference from the facts communicated to him? This question is by no means new, although, on account of the greater importance of the point under the stat. 2 & 3 Vict. c. 29, it has recently been mooted afresh. The words of that statute, which are general—"notice of any prior act of bankruptcy,"—are the same as those of the 6 Geo. 4, c. 16, s. 82, under which a general notice has been held valid, the principle being, that it is sufficient if the party receiving it is thereby put upon his guard: *Hawkins v. Whitten* (a), *Spratt v. Hobhouse* (b). The same principle was applied to the statute of Victoria, in *Ramsey v. Eaton* (c). In *Rothwell v. Timbrell* (d), the notice was in general terms, and no question was raised as to its sufficiency. In *Arthur v. Whitworth* (e), the creditor having pressed his debtor to deposit certain bills of exchange as security for his debt, the debtor deposited them, saying, "it will be of no use to you; I have committed several acts of bankruptcy:" and this was held sufficient notice of an act of bankruptcy within the sta-

1845.
UDAL
v.
WALTON.

(a) 10 B. & C. 217.

(b) 4 Bing. 173; 12 Moore, 395.

(c) 10 M. & W. 22.

(d) 1 Dowl. P. C., N. S., 778.

(e) 6 Jurist, 323.

1845.
UDAL
v.
WALTON.

tute. That decision is precisely in point. *Hocking v. Acraman* (a) may be referred to on the other side, where notice *that a docket was struck* was held not to be sufficient; but that is quite distinguishable; the striking of a docket is an act done by a third party, and is perfectly consistent with the fact that no act of bankruptcy had been committed at all.

Talfourd, Serjt., and *Lush*, contra.—The first question is, whether the bankrupt was a competent witness. [*Anderson*, B.—I do not see why he was not competent to prove even the act of bankruptcy. *Pollock*, C. B.—The validity of the commission was not in issue, and therefore the question as to public policy does not arise.]

Secondly, the notice of the act of bankruptcy was not sufficiently specific to satisfy the statute. This question was considered in a very recent case, of *Conway v. Nall* (b), in the Court of Common Pleas. There it was brought to the knowledge of the creditor, that the debtor against whom the fiat afterwards issued had filed a declaration of insolvency; and it was held, that notice of that fact did not amount to a notice sufficient to satisfy the statute. [*Pollock*, C. B.—That case was decided on the ground that the particulars communicated only amounted to an act of bankruptcy in fieri. It was merely a statement of facts, out of which an act of bankruptcy might perhaps grow.] The words of the statute, "*any* prior act of bankruptcy," appear to point to the communication of some definite specified act. If a general notice, such as this, be held sufficient, some creditor interested to defeat an execution will always serve such a notice, taking his chance of being able afterwards to prove some definite act of bankruptcy, and thus the security which the statute intended to give to execution creditors will be greatly impaired.

(a) 12 M. & W. 170.

(b) 14 Law J. (N.S.), C. P., 165.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. As to the first point, I have no doubt that the evidence of the bankrupt was properly received. His testimony was tendered, not to support the commission, but to prove the petitioning creditor's debt. The question, therefore, as to his competency to support the commission does not arise; he clearly is competent to prove collateral facts; and, in truth, this point was given up on the argument. Then, with respect to the other point, I think the notice of the act of bankruptcy was sufficient. In the case of *Conway v. Nall*, which has been referred to, there was merely a statement of circumstances, which in themselves did not amount to an act of bankruptcy; it was not a mere general notice that the party had actually committed an act of bankruptcy. The case of *Hocking v. Acraman* is not at all opposed to this view of the case. Notice of a docket having been struck merely informs the party that another person has taken a certain step which is adverse to the debtor; the commercial world gather nothing from that fact, except that some person has made a certain affidavit. But here there is direct notice that acts of bankruptcy have been committed, and such a notice is, on general principles, sufficient to satisfy the act of Parliament. There would be great inconvenience in putting any other construction upon it, for there are twenty different kinds of acts of bankruptcy, and it would be almost impossible to state with accuracy what ought to be the form of notice adapted to each act of bankruptcy. Some light is thrown upon this point by the former statute, of the 43 Geo. 3, c. 135, s. 3, which makes the issuing of a commission and the striking of a docket notice of an act of bankruptcy. Now, when a docket is struck, the act of bankruptcy is not stated; it is merely stated that the party is a bankrupt; and the commission itself gives no more information on that subject: nor is the specific act of bankruptcy made known until the examination takes

1845.
UDAL
v.
WALTON.

1845.
 UDAL
 v.
 WALTON.

place. I think, therefore, on principle, that there has been in this case sufficient notice of an act of bankruptcy.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

June 9.

BISHOP v. GOODWIN and Others.

The lessees under a lease of coal mines covenanted thereby, that they would deliver to the lessor two equal thirteenth parts of all coal which should be raised from the mines demised during the term, or would pay him quarterly the value thereof in money; and that, in case, at the end of the first quarter of any year, such quarterly deliveries should not have equalled in value,

or such quarterly payments should not have equalled in amount, the sum of 38*l.* 10*s.*, the lessees should also pay, at the end of every such first quarter, such additional rent or sum as should make up the sum of 38*l.* 10*s.*; and in case, at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equalled in value or amount the sum of £75, then the lessees should also pay, at the end of the second quarter, such further sum as would make up £75; and in case, at the end of the third quarter, such deliveries or payments for that and the two preceding quarters should not have equalled in value or amount the sum of 111*l.* 10*s.*, then the lessees should pay, at the end of the third quarter, such further sum as would make up 111*l.* 10*s.*; and in case, on the 24th June, in any year, the deliveries or payments for that and the three preceding quarters should not have equalled in value or amount the sum of £150, the lessees should pay, on the 24th June, such an additional sum as would make up £150; it being the intent and meaning of the parties, that the royalties thereby reserved should always amount to £150 per annum at the least:—*Held*, that, in calculating the amount of royalty due to the lessor at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter, against a deficiency in the previous quarter; but that the lessees were entitled, at the end of each quarter, to the full sum of 38*l.* 10*s.*

terly the value thereof in money. It also contained a provision, that in case, at the end of the first quarter of any one year of the said term, such quarterly deliveries should not have equalled in value, or such quarterly payments in money should not have equalled in amount, the sum of 38*l.* 10*s.*, then the lessees should also pay, at the end of every such first quarter, such additional rent or sum of money as would make up the sum of 38*l.* 10*s.*; and in case, at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equalled in amount or value the sum of £75, then the lessees should also pay, at the end of every such second quarter, such further sum as would make up the said sum of £75; and in case, at the end of the third quarter, such deliveries or payments for that and the two preceding quarters should not have equalled in amount or value the sum of 111*l.* 10*s.*, then the lessees should pay, at the end of such third quarter, such further sum as would make up the sum of 111*l.* 10*s.*; and in case, on the 24th day of June, in any year, the deliveries and payments for that and the three preceding quarters should not have equalled in amount or value the sum of £150, then the lessees should pay, on the said 24th day of June, such additional rent or sum as would make up the sum of £150; it being the intent and meaning of the parties to the said lease, that the royalties thereby reserved should always amount to the sum of £150 per annum at the least.

The arbitrator found, by his award, that there was raised from the mines demised, between the 12th of January, 1837, and the 25th of March, 1844, a quantity of coal, of which the value of two equal thirteenth parts, after certain deductions, amounted to the sum of 1061*l.* 5*s.*, which sum had become due from the defendants to the plaintiff; and that, during the same period, there became due from the defendants to the plaintiff the further sum of 179*l.* 18*s.* 4*d.*, being the aggregate of the sums necessary to make up the said minimum rent of £150 due under

1845.
BISHOP
v.
GOODWIN.

1845.
 {
 BISHOP
 v.
 GOODWIN.

the lease. But the arbitrator did not, in calculating the said sum of 179*l.* 18*s.* 4*d.*, set off the excess in value of the royalty accruing in any one quarter of a year, against the deficiency in any previous quarter.

The award then stated, that, if the Court should be of opinion that the minimum rent of £150 was an *annual* minimum, and that, in calculating the amount due to the plaintiff at the end of each year, the excess of royalty accruing in one quarter was to be set against the deficiency in a previous quarter, so that, at the end of each year, the plaintiff would be entitled to no more than £150, unless the value of two thirteenths, minus the deductions during that year, amounted to a greater sum, (in which case it was admitted that he would be entitled to that sum), then the verdict for the plaintiff was to stand, but the damages were to be reduced by the sum of 64*l.* 15*s.*

On a former day in this term, accordingly, *J. W. Smith* obtained a rule, calling upon the plaintiff to shew cause why the damages should not be reduced by the sum of 64*l.* 15*s.*, contending that such was the true construction of the lease; against which

Whateley (*Whitmore* with him) now shewed cause.—There is no foundation for this rule; for it is clear that the true construction of this lease is, that this is a *quarterly*, not a *yearly* reservation of the rent. The amount is to be settled in each quarter; and no two quarters can be blended together, so as to make up the deficiency in one by the excess in another. It was the obvious intention of the parties, that the royalty should always amount to 38*l.* 10*s.* per quarter at the least. There is not a word to shew that any excess on any quarter is to be repaid. If the royalty in any quarter falls short of that sum, the difference is to be made up; and if in any quarter it exceeds that sum, the actual amount must be paid to the plaintiff. Even if no coal is raised in the first quarter, the defendants are to pay 38*l.* 10*s.* for that

quarter. [*Pollock*, C. B.—You say that, in calculating the rent from quarter to quarter, you carry on a surplus, but not a deficiency.] Yes.—The Court then called on

1845.
BISHOP
v.
GOODWIN.

J. W. Smith, in support of the rule.—The argument on the part of the defendants rests on the concluding words of the clause, “that the royalties thereby reserved should always amount to the sum of £150 *per annum* at the least.” Are they not to have the benefit of a great excess in the fourth quarter, supposing them to have raised no mineral in the other three quarters? [*Alderson*, B.—Then they should have said that the plaintiff should not be paid *more than* £150, *unless* in each quarter the deliveries or payments should not have equalled in amount or value the sum of 38*l.* 10*s.* It is quite clear that in each quarter that amount is to be made up, and the money paid.] The intention to secure to him £150 *per annum* at the least would be carried out by returning the 111*l.* 10*s.* already paid, if there were an excess to the same amount in the last quarter. [*Pollock*, C. B.—It is, for one purpose, a quarterly rent; but the quarters are blended together for the purpose of taking care that, at the end of the second quarter, there shall be £75, of the third, 111*l.* 10*s.*, and of the fourth, £150. *Alderson*, B.—There is nothing to shew that money once paid is ever to be restored.] Three of the quarters might be spent in an outlay in preparing the mine for working, or clearing it of water. Surely it is just that the leasees should be reimbursed out of the excess in the fourth quarter, if the £150 be equally secured.

POLLOCK, C. B.—The true construction of the lease is clearly this, that if the royalty in any quarter falls short of 38*l.* 10*s.*, it must be made up to that sum; but, if the royalty in any quarter exceeds that sum, there is nothing in the lease to shew that the surplus is to be given back to the leasees. A balance is to be carried forward in favour of the landlord, but not against him.

1845.
 BISHOP
 v.
 GOODWIN.

ALDERSON, B.—Mr. *Smith's* argument really comes to this, that there is more injustice in settling the account in successive quarters than in successive years; for it is admitted that there is not to be any recouping in any subsequent year. If he is right, I do not see how we could stop short of retracing the account after the lapse of twenty years. As the covenant stands, it is clear that the rent is to be made up every quarter, and the landlord is not to have less than £150 in the year, although he may obtain a larger sum, compounded of the rent and royalty.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

June 10.

SMITH v. GOFF (a).

A cause was referred by order of Nisi Prius, which stated that "the arbitrators should be at liberty, if they should think fit, to examine the parties and their respective witnesses on oath:"—*Held*, that it was discretionary with the arbitrators whether they would examine the witnesses on oath or not, and that it was no objection to their award that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn.

A RULE had been obtained by *Petersdorff*, calling on the plaintiff to shew cause why the award made in this cause should not be set aside, on the ground that the arbitrator had taken the evidence of the witnesses without their being sworn.

The cause was referred by an order of *Rolfe*, B., which was in the usual printed form, and contained the following clause: "The arbitrators or umpire shall be at liberty (if they shall think fit) to examine the parties and their respective witnesses on oath." And it appeared by the affidavits, that the defendant, in the course of the reference, required the umpire to take the examination of the witnesses on oath, which he declined to do.

Hance shewed cause, and contended, that, by the express wording of the order of reference, it was left entirely in the option of the arbitrators whether they would take the evidence of the witnesses on oath or not; that there was

(a) Decided by *Parke*, B., sitting alone.

no rule of law which rendered it incumbent on them to examine the witnesses on oath; that, previously to the statute 3 & 4 Will. 4, c. 42, an arbitrator had no power whatever to administer an oath; and the 41st section of that act empowered and *required* him to do so only in cases where it was, by the order of reference, or the submission to arbitration, expressly ordered or agreed that the witnesses *should* be examined on oath, in which case no discretion was left to the arbitrator: that the words "shall be at liberty if they think fit," &c. could not, as would probably be contended by the other side, be confined to the *parties* to the suit, but overrode the whole sentence, and must be taken to apply equally to the *witnesses* as to the parties themselves, and that it would otherwise be impossible to construe the sentence grammatically. He also contended, that, even if it were obligatory on the arbitrator to take the evidence on oath, there had been a waiver of the objection, by the subsequent attendance of the defendant and his witnesses before the arbitrator; but the argument on this part of the case is omitted, as the judgment of the Court proceeded entirely on the other point.

1845.

SMITH
v.
GOFF.

Petersdorff, in support of the rule.—It has been generally considered that an arbitrator was *bound*, under an order of reference like the present, to examine the *witnesses* upon oath, if required to do so by either side; and as in this case the defendant expressly required that the witnesses should be sworn, the umpire was not justified in taking their evidence otherwise than upon oath, in defiance of the defendant's request. The terms of the order of reference may appear to give the arbitrator an option, but its real meaning is, that it should, as far as the *witnesses* are concerned, be obligatory on him to examine *them* upon oath, and that he was only at liberty to exercise a discretion with respect to the examination of the parties to the suit.

1845.

SMITH
v.
GOFF.

PARKE, B.—No; the order of reference clearly leaves the whole in the discretion of the arbitrators; and although one side required the witnesses to be sworn, the other side did not; and I am clearly of opinion that the arbitrators were not *bound* to examine the witnesses on oath. If you had intended it to be imperative on them, you should have had the order of reference framed accordingly, and have stated therein, that the arbitrator *shall* examine the witnesses on oath. The rule must therefore be discharged.

Rule discharged, with costs.

June 11. KYNASTON and Another, Assignees of JOHN HOLLAND BAKE, Bankrupt, v. CROUCH.

A trader committed a secret act of bankruptcy, by leaving his house; but, before he left, desired the defendant, his foreman, who had been accustomed to manage his business for him, to carry it on in his absence. The defendant did so accordingly, and received several sums of money for debts due to the bankrupt, and for goods sold after the act of bankruptcy. He also made several *bonâ fide* payments; some to creditors of the bankrupt, for the expenses of housekeeping, and retained some for wages due to himself. The monies were received and the payments made without notice of the act of bankruptcy. An action having been brought by the assignees to recover the money so received as money had and received to their use, the defendant pleaded never indebted, and a set-off:—*Held*, that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and that he was not entitled to set off any of the payments made by him.

THIS was an action of debt by the plaintiffs as assignees, to recover the sum of 153*l.* 13*s.*, as money had and received by the defendant to their use as assignees.

PLEAS.—First, never indebted; secondly, a set-off for work and labour done for the plaintiffs, for money lent, and on an account stated.

At the trial, before *Patteson, J.*, at the last Summer Assizes at Bristol, it appeared that *Bake* was a tradesman at Bristol, and the defendant his foreman, who attended at his shop and managed his business for him. On the 22nd

of the month of August, 1844, *Bake* was adjudged bankrupt. The defendant, who was his foreman, had been employed by him for several years, and had received several sums of money for debts due to the bankrupt, and for goods sold after the act of bankruptcy. He also made several *bonâ fide* payments; some to creditors of the bankrupt, for the expenses of housekeeping, and retained some for wages due to himself. The monies were received and the payments made without notice of the act of bankruptcy. An action having been brought by the assignees to recover the money so received as money had and received to their use, the defendant pleaded never indebted, and a set-off:—*Held*, that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and that he was not entitled to set off any of the payments made by him.

Semble, that the defendant might have protected himself by a special plea, as to the payments and disbursements made by him without notice of the act of bankruptcy, under 6 Geo. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29, s. 1.

Quære, whether the plea of not guilty in trover does not put in issue the wrongful nature of the conversion.

October, 1843, Bake committed a secret act of bankruptcy, by leaving his house, under pretence of going to London for the purpose of paying some bills; and, on going away, directed the defendant to carry on the business in his absence. The defendant accordingly carried on the business in his master's absence, and received in the shop various sums of money, amounting in the whole to 153*l.* 13*s.*, some of which were for shop goods sold by him after the act of bankruptcy, and the residue monies received from debtors to the bankrupt. He also made payments to various persons, in the course of carrying on the business in the bankrupt's absence; some to creditors, some for the expenses of housekeeping, and a small sum he retained for wages due to himself; and these payments altogether amounted to the sum of 153*l.* 13*s.*, received by him. It appeared that the defendant had no notice of the act of bankruptcy until the 9th November; and that of the payments thus made by him, £21 only was paid after that day, and previous to the issuing of the fiat, on the 14th of the same month. The above payments, as the jury found, were made *bonâ fide*. It was contended, on the part of the defendant, at the trial, first, that the action for money had and received was not maintainable against the defendant, he being only the servant of the bankrupt, and no contract, express or implied, existing between him and the assignees; secondly, that, admitting him to be liable to the plaintiffs in the first instance, he was entitled to set off against their demand the money which he had paid to the creditors of the bankrupt, or at least that portion of it which was paid by him before he had notice of the act of bankruptcy. The learned Judge, however, was of opinion, that as, by the act of bankruptcy, the money of the bankrupt was vested in his assignees, the defendant was liable to them for every part of it received by him after the act of bankruptcy, and that he was not entitled to take credit for any of the payments, as he had no authority from the assignees to make

1845.
KYNASTON
v.
CROUCH.

1845.
 KYNASTON
 v.
 CROUCH.

them. A verdict was accordingly returned for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit, if the Court should think the action would not lie under the circumstances, or to reduce the verdict to such amount as the Court should think fit. A rule for this purpose having been obtained in Michaelmas Term last,

Cockburn and *Greenwood* shewed cause in the Sittings after last term (May 14).—It is an established rule, that all money belonging to a bankrupt, received by any one after the act of bankruptcy, becomes the property of the assignees, and may be recovered by them in an action for money had and received. The money received by the defendant was, therefore, the money of the assignees, and he is bound to refund it to them. If the money were afterwards paid away by him under circumstances which would afford a defence to this action, that ought to have been specially pleaded. In *Pearson v. Graham* (a), where all the cases on this subject are collected, it was held that, where the servant of a bankrupt had bonâ fide sold goods of the bankrupt under a general authority from him after an act of bankruptcy, of which the defendant was ignorant, he was guilty of a conversion; and that, if he had any justification, he should have pleaded it specially. Such a plea was pleaded in *Harwood v. Bartlett* (b), and the defendant ought to have pursued that course here. [Parke, B.—You say, that if he wished to discharge himself from liability under 2 & 3 Vict. c. 29, he ought to have pleaded specially, that since he received the money he had paid it away under circumstances which would protect him. The defendant will probably argue, that, having received the money without notice of an act of bankruptcy, he cannot be said to have received it to the use of the assignees.] The case of *Coles v. Wright* (c) will perhaps be relied upon. There

(a) 6 Ad. & Ell. 899; 2 Nev. & P. 636.

(b) 6 Bing. N. C. 61; 8 Scott, 171.

(c) 4 Taunt. 198.

a trader, being in prison, employed an auctioneer to sell certain goods for him, who sent him the money produced by the sale by the hands of the defendant; the trader having become bankrupt by lying two months in prison, it was held that his assignees could not recover from the defendant the money he had so received and paid over. But that case is distinguishable from the present, for there the money was paid into the hands of the trader before the act of bankruptcy was committed; neither was it received in the course of a general employment, but for the specific purpose of being carried to the trader, the defendant being the mere bearer of it.—They also referred to the judgment of *Buller, J.*, in *Vernon v. Hankey (a)*, and to the case of *Turquand v. Vanderplank (b)*.

1845.
KYNASTON
v.
CROUCH.

Crowder and *Butt*, in support of the rule.—The money having been bonâ fide paid by the defendant to creditors and others, without any knowledge of an act of bankruptcy committed by the bankrupt, he is not liable to the assignees for the money so paid, and it would be a great hardship if he were held liable; and the holding him to be so would go farther than any case has yet gone. It is for the benefit of the creditors of a bankrupt that the trader's business should not be stopped by the bankruptcy; but if his shopmen, who are bound to obey their master's orders to carry on the business, are to be held liable to his assignees for so doing, it must tend to produce that effect. This case comes within the protecting clauses of the 6 Geo. 4, c. 16, and the 2 & 3 Vict. c. 29. By the 82nd section of the first-mentioned act it is enacted, that "all payments really and bonâ fide made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment

(a) 2 T. R. 121.

(b) 10 M. & W. 180.

1845.
 KYNASTON
 v.
 CROUCH.

not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bonâ fide made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of an act of bankruptcy by such bankrupt committed." And by the 2 & 3 Vict. c. 29, s. 1, it is provided, that "all contracts, dealings, and transactions by and with any bankrupt, really and bonâ fide made and entered into before the date and issuing of the fiat against him, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt had not, at the time of such contract, dealings, or transactions, notice of any prior act of bankruptcy by him committed." Had these payments been made by the bankrupt himself, they would clearly have been protected by these statutes; and it would be absurd to hold that his servant, who is for this purpose nothing more than his hand, and a mere conduit-pipe, should be held liable for them. [*Parke, B.*—With respect to the goods sold in the shop, the defendant is more than a mere conduit-pipe; and, by selling them, he was guilty of a conversion, as was held in the case of *Stephens v. Elwall (b)*.] The facts of that case distinguish it from the present, and the Court will not extend so objectionable a principle. [*Parke, B.*—If this money had been paid away by the bankrupt himself, the payment would be protected; and it certainly seems reasonable, that if the servant pay it

over to a third person by the authority, expressed or implied, of the bankrupt, it should be protected, as being a payment by the bankrupt himself; but the difficulty is, that you have not pleaded that. The money, when received in the first instance, was money received to the use of the assignees, it having been their money by relation from their appointment to the time of the act of bankruptcy; and, if sued by them for it, the defendant should protect himself by pleading that he paid it away under the authority of the bankrupt. And as to the money received from the debtors, he might say that it was protected as a payment to the bankrupt within the statute. I do not think there is any hardship in that view of the case.] In *Coles v. Robins* (a), Lord *Ellenborough* says, "The stat. 1 Jac. 1, c. 15, contains a favourable provision for persons dealing with traders who have committed a secret act of bankruptcy, and ought to receive a liberal construction in respect to bonâ fide transactions." And in *Coles v. Wright* (b), *Mansfield*, C. J., says, "It seems a monstrous thing to say, that every one who takes money in the character of a messenger or bearer should be so liable; it may happen to pass through the hands of two or three persons, who would each be liable to an action. No case goes that length, and the doctrine of the relation of the act of bankruptcy is in all cases extremely hard, and in many shocking, and it is not to be carried farther than we are compelled to carry it." So also, in *Tope v. Hockin* (c), Lord *Tenterden*, C. J., after saying that the defendant appeared to be a mere channel of conveyance, adds, "It is obvious that much inconvenience and obstruction to business might take place, if one who is employed as a mere gratuitous carrier, or made the gratuitous channel of conveyance or delivery, should be answerable for property passing through his hands, under circum-

1845.
KYNASTON
v.
CROUCH.

(a) 3 Camp. 185.

(b) 4 Taunt. 199.

(c) 7 B. & C. 101, 111.

1845.
 KYNASTON
 v.
 CROUCH.

stances which lead to no suspicion that the transfer may not be made lawfully, and without injury to the right of any third person. And a decision to this effect would be a great hardship on the individual so employed, and give a very harsh (and I may say, as to him, a very injurious) effect to that relation of the act of bankruptcy, which, though necessary for many purposes, it has been the object of the legislature, in modern times, to narrow and contract within the compass that justice to particular individuals requires." *Pearson v. Graham*, which has been cited on the other side, proceeded on the ground that the person who paid over the money did so with notice of the act of bankruptcy. [*Parke, B.*—There was a case some years ago, in which there was an able argument of my Brother *Maule*, when at the bar, to shew that the case of *Stancliffe v. Hardwick(a)*, in this Court, was wrongly decided, and that the plea of not guilty, in an action of trover, does not put in issue the mere simple fact of conversion, but that under that plea a defendant might shew, either that the conversion never took place in fact, or, if it did, that it was not a wrongful conversion. I have very great doubt, to say the least of it, whether that argument was not well founded, and whether we were right in our judgment in *Stancliffe v. Hardwick*, upon that part of the case.] With respect to the money paid away by the defendant after notice of the act of bankruptcy, it is recoverable from the parties who received it, and if the present action be maintainable, the assignees would be paid twice over.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, which was argued at the Sittings after last Term, we agree with my Brother *Patteson*,

(a) 2 C., M., & R., 1.

who held that the plaintiffs were entitled to recover, and are of opinion, that the rule which has been obtained to enter a nonsuit, or reduce the damages, must be discharged.

The action was brought by the plaintiffs as assignees of one Bake, a bankrupt, for money had and received to their use. There was a plea of never indebted, and of set-off for work and labour done by the defendant for the plaintiffs, money lent, and on an account stated. The sum sought to be recovered was 153*l.* 13*s.*, received by the defendant after the 22nd October, 1843, on which day Bake committed an act of bankruptcy. A fiat was issued on the 14th November in the same year. The bankrupt was a tanner, the defendant was his servant, and attended in his shop and managed his business for him; after the bankrupt had left home, (which was the act of bankruptcy), the defendant received in the shop various sums of money; some for shop goods sold by him after the act of bankruptcy, the residue from debtors to the bankrupt, who paid the amount of their respective debts to him. The defendant made payments to various persons, in the course of carrying on the business in the bankrupt's absence; some to creditors, some for the expenses of house-keeping, and a smaller sum he retained for wages due to himself; and those payments altogether equalled the 153*l.* 13*s.* received by him. But a part of these payments, amounting to £21, were made after the defendant had notice of the act of bankruptcy, viz. on the 9th November. The jury found that all were bonâ fide made.

Upon these facts, the learned Judge thought that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and was not entitled to take credit for any of the payments; and we are all of the same opinion.

The sums received by the defendant after the bankruptcy for the sale of goods by him, and those received from debtors, stand on a different footing.

As to the former, the goods were the property of the as-

1845.
KYNASTON
v.
CROUCH.

1845.
 KYNASTON
 v.
 CROUCH.

signees by relation; for we must still consider the relation to exist, although it is remarkable that the legislature, by 6 Geo. 4, s. 16, repealed the statute 15th Eliz. c. 7, on which it depended, without expressly re-enacting its provisions. The defendant, by selling the goods, was *primâ facie* guilty of a conversion, and was liable in an action of trover, though he was merely the servant of the bankrupt; and if liable in trover, the assignees might sue him for money had and received, instead of that form of action, and by so doing they would only waive the tort and affirm the sale, and take to the net proceeds as the value of the goods, subject to the consequences of treating the demand as a debt, and letting in the right of set-off, where there is a liquidated cross demand, but no more. They do not thereby ratify and confirm the subsequent application of the proceeds by the defendant; *Hunter v. Prinsep* (a); and the implied authority previously given by the bankrupt so to apply them was determined by the act of bankruptcy, and does not bind the assignees. The set-off, as pleaded, was not proved, and therefore, as to this part of the demand, the plaintiffs were certainly entitled to recover on the present pleadings, if the defendant was liable in trover.

But if a title had been vested in the purchaser by the sale, he would have been protected by the provisions of the statute 6 Geo. 4, c. 16, and 2 & 3 Vict. c. 29, as a *bonâ fide* purchaser, so that the action of trover could not have been maintainable against him; and it seems to follow that the defendant would not have been liable in the like action; for that act which vested a valid title in another could not well be deemed a conversion. It was not left to the jury, in the present case, whether the purchasers of the goods had notice of the act of bankruptcy, and, consequently, whether the sale to them was valid or not; but, assuming that it was valid, and that an action of trover could not have been supported against them, nor consequently against

(a) 10 East, 399.

the defendant, still we think that the action for money had and received would lie, because, the moment the money was received, it was money, by relation, received for the assignees by the defendant at the time it was received; if subsequently misapplied by the defendant, so that the money was not in his hands at the time of the appointment of assignees, he would still be liable in that form of action. At one time, therefore, the defendant was indebted for money had and received, upon either supposition, viz. that the sale of the goods was a tort or was not; and whether he was ever indebted was the only question on these pleadings. The claim for the residue of the money, viz. that received from the debtors of the bankrupt, is differently situated, and requires further consideration. If the debts due from the debtors at the time of the act of bankruptcy (which were themselves assigned by the operation of the bankrupt statutes to the plaintiffs) were not discharged by the payments made to the bankrupt or his servant, so that the debtors would be still liable to the assigns; and if the monies paid by the debtors were paid under such circumstances as that they could be still treated as their own, and recovered back from the defendant as such (circumstances not very likely to occur), there would be a great difficulty in holding that the plaintiffs could recover the amount against the defendant as money had and received. But if the payment to the defendant discharged the debts, the money which originally was the debtor's thereby ceased to be such, and being received on account of the bankrupt, would pass to his assignees; for the assignment operates on all property existing at the time of the act of bankruptcy, and all subsequently acquired, just as if a fresh assignment were made at the time each portion of property was so acquired; and if the payments vested the money in the bankrupt, although the debt were not discharged, the same consequence would follow.

Upon referring to the facts in this case, there is no ques-

1845.
KYNASTON
v.
CROUCH.

1845.

KYNASTON
v.
CROUCH.

tion but that the payments either discharged the debts (for no doubt they would not have been made if the debtors had had notice of an act of bankruptcy), or, if they did not, that the money paid vested in the bankrupt; and in either case, the plaintiffs were entitled to recover the amount, as property acquired after the act of bankruptcy, which belonged by virtue of the assignment to the assignees, and which, therefore, when received, was money received to their use.

We think, therefore, that the action for money had and received to the use of the assignees will lie in this case. Whether the defendant could not have protected himself by a proper plea, as to part of the money received, whether for sale of goods or payment of debts, as having made the several payments and disbursements without notice of an act of bankruptcy, and so being entitled to the protection of the statute 6 Geo. 4, c. 16, and 2 & 3 Vict. c. 29, is a different question, on which it is unnecessary to give an opinion; but it must not be inferred that the defendant would have been liable to refund the whole of the money received, if he had pleaded so as to avail himself of the protection which the statutes give.

On the part of the defendant, it was contended that he was not liable, because he was merely the means of carrying the money from the hand of one person to another, a messenger or carrier, and fell within the principle of *Cole v. Wright* (a), which was also adopted in the case of *Tope v. Hockin* (b).

It is clear that this principle is wholly inapplicable to the case of the shop goods sold, if the defendant was a wrong doer by relation. We think, also, that the defendant cannot be considered as a mere channel of conveyance, with respect to the monies received for the goods or paid by the debtors. They were payments to him as agent to the bank

(a) 4 Taunt. 198.

(b) 7 B. & C. 110.

rupt; but they were general payments, without any direction, express or implied, to pay them over to his master. The moment the money got into the defendant's hands, the debtor was discharged, and he had no interest in any subsequent application of it; and therefore he cannot be considered as having paid it upon a special trust or direction to pay it over. As between the debtor and bankrupt, it was a payment to the latter; but, as between the assignees who represent the bankrupt and the defendant, it was money paid to their use; and as the defendant has not pleaded specially that he has paid it to the bankrupt, without notice of bankruptcy, or in any other way, so as to avail himself of any defence which the statutes mitigating the effect of the harsh relation to the act of bankruptcy provided, he is liable in this action.

Rule discharged.

1845.
KYNASTON
v.
CROUCH.

NORMAN v. PHILLIPS.

June 11.

ASSUMPSIT for goods bargained and sold, goods sold and delivered, money paid, and on an account stated. Plea, non-assumpsit.

At the trial before *Pollock*, C. B., at the last assizes for the county of Berks, it appeared that the plaintiff was a timber-merchant in London, and the defendant a builder in Wallingford, and that, on the 17th of April, the defendant gave a verbal order to the plaintiff's traveller for

The defendant, a builder at Wallingford, gave the plaintiff, a timber-merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway, to be for-

warded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, and arrived at the Wallingford station on the 19th of April, and the defendant was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the plaintiff himself until the 28th of May, when he informed the plaintiff that he declined taking the timber:—*Held*, that although there might be a scintilla of evidence for the jury of an acceptance of the timber within the Statute of Frauds, yet that there was not sufficient to warrant them in finding that there was such an acceptance; and the Court set aside a verdict found for the plaintiff as not warranted by the evidence.

1845.
 NORMAN
 v.
 PHILLIPS.

yellow deals, amounting in value to 32*l.* 14*s.* 4*d.*, with directions for them to be sent to the Paddington station of the Great Western Railway, to be forwarded to him, as had been the practice between the parties on previous occasions. On the 19th of April, the deals arrived at the Wallingford station, on which day the defendant was informed by the railway clerk that they were lying for him at the station, when he said he would not take them. An invoice was also sent on the 27th of April, which the defendant received and kept; but it did not appear that he had ever seen the timber. On the 28th of May, the defendant informed the plaintiff that he declined to take the goods, and, on the 22nd of June, made a similar communication in writing to the railway clerk. Under these circumstances, it was contended for the defendant, that there was no evidence of a sufficient acceptance by him to satisfy the Statute of Frauds, and that the plaintiff ought to be nonsuited. The learned Judge, however, refused to nonsuit and directed the jury to find their verdict for the plaintiff but gave the defendant leave to move to enter a nonsuit a verdict for him. A rule having been accordingly obtained,

Keating and Dowdeswell shewed cause (June 7).—There was sufficient evidence of acceptance of the goods to take the case out of the Statute of Frauds; for there was delivery of the goods sold to a party to whom they were to be delivered, acquiesced in by the defendant, which amounted to an acceptance of them. The delivery need not be by the party himself, but a delivery to a carrier pointed out by him is sufficient: *Daves v. Peck* (a). It was there held that when a consignor delivers goods to a particular carrier by the order of the consignee, and they are afterwards lost, the action can only be brought by the consignee.

(a) 8 T. R. 330.

1845.
 NORMAN
 v.
 PHILLIPS.

and it does not appear that that has ever been disputed. And in *Hart v. Sattley* (a) the decision went further; and it was held, that if goods be ordered verbally, the delivery of them to a carrier is sufficient to bind the contract according to the Statute of Frauds, when the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance. In every case in which the vendee designates the party to whom the goods are to be delivered, a delivery to that party is sufficient. A delivery to a carrier named by the vendee is tantamount to a delivery to himself. [*Alderson*, B.—Can there be an acceptance, so long as the buyer has a right to object to the quality of the goods? and is he precluded from objecting, because he directs them to be sent by a particular conveyance? The case of *Johnson v. Dodgson* (b) shews that he is not.] Here the party had lost the right to object to the quality by not objecting in a reasonable time. The goods arrived on the 19th of April at the Wallingford station, and the defendant was informed of it; but it was not until the 28th of May that he informed the plaintiff that he declined taking them. A party loses his right to object to the quality by not doing it in a reasonable time. His refusing at the time to receive them from his own agent is nothing. In *Coleman v. Gibson* (c), it was held, that a party, who has the right of approval, must refuse to accept the goods in a reasonable time; and if he does not, he is to be treated as having accepted them. [*Alderson*, B.—There is no doubt that, by retaining goods which have been delivered an unreasonable time, the party to whom they are delivered loses his right to object to them, and it amounts to acceptance. But I cannot see how there was any acceptance here. The person to whose possession these goods came was not the person to examine

(a) 3 Camp. 528.

(b) 2 M. & W. 653.

(c) 1 M. & Rob. 168.

1845.
 NORMAN
 v.
 PHILLIPS.

the quality of them. *Pollock*, C. B.—The defendant objected at the time to take the goods away. He was not bound to send them back again.] There was evidence to go to the jury of acceptance. He was told of the arrival of the goods, and afterwards received an invoice of them, which he kept, without informing the plaintiff that he declined to receive them. That, it is submitted, is evidence of acceptance. [*Alderson*, B.—He must accept the goods, and *actually receive the same*, to constitute an acceptance within the meaning of the statute. Here the goods are sent in the usual way, but when they arrive at the carrier's warehouse the defendant refuses to take them. That can scarcely be said to be an acceptance.] The case of *Bushel v. Wheeler* (a), where a delivery under precisely similar circumstances was held to amount to evidence of acceptance, is not distinguishable from the present case. There the defendant ordered goods to be sent by a particular carrier, and they were sent accordingly; and an invoice was afterwards sent by post, and a printed notice that the goods were supplied at three months' credit. The goods were placed in the carrier's warehouse, and the purchaser, who was apprised of the fact, allowed them to remain there six or seven months, at the end of which time he informed the warehouseman that he did not intend to take them, whereupon they were returned to the seller; and it was held that this was evidence for the jury of acceptance. [*Alderson*, B.—In that case, the vendee did not reject them for seven months; and *Coleridge*, J., puts his judgment on the ground that the inspection of the goods was to be made within a reasonable time. Here the defendant, immediately on being told by the carrier that the deals had arrived, says he will not take them.] Telling the carrier that he will not take them, is only like saying it to himself. In order to make

(a) 8 Jurist, 532.

845.
 NORMAN
 v.
 PHILLIPS.

that of any avail, it should have been communicated to the plaintiff. The defendant's allowing the goods to remain a very considerable time, seven or eight weeks, and not informing the seller that he would not accept them, are facts from which the jury were at liberty to infer acceptance. The lapse of time made it a question for the jury, whether the defendant had accepted the goods or not. [*Alderson*, B.—If the carrier was not the defendant's agent to accept the goods in the first instance, I do not see how he becomes so from the goods being in his possession for some time.] *Bushel v. Wheeler* is an authority that this amounts to evidence of acceptance; and that case is in accordance with *Coleman v. Gibson* (a). Here the contract was, that the deals were to be sent by the railway to the Wallingford station; but when they arrive there, the defendant, on being informed of it, says he will not take them, but he does not communicate that to the plaintiff. [*Alderson*, B.—The strength of the argument is certainly the non-communication of his refusal to take them.] It amounts to an acceptance by acquiescence. [*Alderson*, B.—Where goods are in a party's own hands, he has an opportunity of examining them; and his saying nothing in such a case would be evidence of acceptance by acquiescence.] Here the carrier was the agent of the defendant designated by him; and he was his agent not only to receive, but to accept the goods. [*Alderson*, B.—No; he was not his agent to accept them. An acceptance is not complete until the party has precluded himself by what he does from objecting to the quality of the goods.] The cases of *Doddsley v. Varley* (b), *Phillips v. Bistolli* (c), *Egan v. Duffield* (d), and *Blenkinsop v. Clayton* (e), are all authorities to shew that this was evidence for the jury of acceptance.

(a) 1 M. & Rob. 168.

(d) 1 Q. B. 302; 4 Per. & D.

(b) 12 Ad. & Ell. 632; 4 Per. 656.

& D. 448.

(e) 7 Taunt. 597.

(c) 2 B. & C. 511; 3 D. & R. 822.

1845.
 NORMAN
 v.
 PHILLIPS.

Talfourd, Serjt., and *Gray*, in support of the rule.—The fallacy of the argument is in treating this verbal contract as if it were a valid contract in writing, and proving this to be an acceptance by the aid of it; whereas in truth it amounts to nothing, and was not admissible in evidence for any purpose. There was here nothing like an acceptance; for the defendant, on being told that the goods had arrived, said he would have nothing to do with them. [*Alderson*, B.—When you introduce the fact that the goods were to be sent to a particular carrier, you introduce a part of the contract which the statute says shall not be evidence unless it is in writing. All that can be assumed to be the fact is, that goods sent by the plaintiff to the defendant had been usually sent by that carrier, and in that mode.] The carrier was not the defendant's agent to accept the goods. The fact of acceptance is only attempted to be proved by introducing part of the contract by parol evidence, and then coupling the fact of the arrival of the goods with it. But if the facts be taken to be so, there is ample evidence of repudiation of the contract, for the defendant immediately says he will not take them. [*Alderson*, B.—It is not what the defendant thought or told the carrier, but what he gave the plaintiff reason to believe, that affects the case. It is for the plaintiff to make out that there was an acceptance of the goods. It is difficult to distinguish this case from *Bushell v. Wheeler*, where the Court of Queen's Bench held, under nearly similar circumstances, that it was evidence of acceptance for the jury. *Pollock*, C. B.—We will take time to consider.]

Cur. adv. vult.—

On the 11th of June,

POLLOCK, C. B., said—After the case of *Bushell v. Wheeler*, we cannot deny that there is a scintilla of evidence to go to the jury of an acceptance; yet, in my opinion, there is

no evidence on which the jury ought to have found an acceptance. As, therefore, they ought to have found a verdict for the defendant, I think this rule ought to be made absolute.

1845.
NORMAN
v.
PHILLIPS.

ALDERSON, B.—If it had not been for the case of *Bushel v. Wheeler*, I should have said there was no evidence whatever for the jury of acceptance. The true rule appears to me to be, that acceptance and delivery under the Statute of Frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods; as, for instance, if, instead of sending the goods back, he keeps or uses them. Here the goods were not in the possession of the party himself, though the same rule would hold if they were delivered to a general agent, or to a party who is authorised by him to examine the quality of the goods. But the carrier is only an agent for the purpose of carrying; and here the purchaser himself immediately refused to take the goods. If a carrier is not originally an agent to accept the goods, he cannot be made so by mere lapse of time. After the case of *Bushel v. Wheeler*, I cannot say that there is no evidence of acceptance to go to the jury; but I think that a verdict found for the plaintiff on such facts as those which exist in the present case is clearly not warranted by the evidence, and therefore the rule ought to be made absolute.

ROLFE, B.—Had it not been for the case of *Bushel v. Wheeler*, I should have thought that there was no evidence of acceptance to go to the jury. But, although it be taken that there was some slight evidence for the jury, I think the proper conclusion for them to draw would be, that it was not sufficient evidence of acceptance.

PLATT, B., concurred.

Rule absolute.

1845.

June 12.

THE ATTORNEY-GENERAL *v.* The Marquis of HERTFORD.

A., by deed dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to *B.*, his son, for life, with remainders over. The deed contained a proviso that it should be lawful for *B.*, by his last will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of £700, to be charged upon and payable out of the lands included in the deed, to commence from the death of *B.*, and to be either perpetual or in fee, or payable for such times and in such manner in all respects as *B.* should think fit. *B.*, by his will, by virtue of this power, appointed an annuity of £700 a year to *C.* for her life, charged upon and payable out of the said land:—*Held*, that legacy duty was not payable in respect of such annuity.

THIS was an information for legacy duties, and stood for trial at the Middlesex Sittings after last Michaelmas Term when, by consent, the following special verdict was taken:—

By indenture of release, dated the 2nd of October, 1802, made between Francis, Marquis of Hertford, Francis Seymour Conway, Earl of Yarmouth, his eldest son (the testator), and others, certain lands, &c., were granted to trustees, amongst other purposes, to the use of the said Francis, Marquis of Hertford, for his life, remainder to the use of Francis Seymour Conway, Earl of Yarmouth, for his life, with remainders over. The indenture contained the following proviso:—"Provided always, nevertheless, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for the said Francis Seymour Conway, Earl of Yarmouth (the said testator), from time to time, or at any time, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, to limit or appoint to or to the use of himself, or any other person or persons whomsoever, any annual sum or annual sums of money, yearly rent-charge or rent-charges, not exceeding in the whole the yearly sum of £700 of the lawful money of Great Britain, to be issuing and payable out of, and charged and chargeable upon, all or any of the manors or other hereditaments hereby limited and appointed, and

granted and released, or expressed or intended so to be, situate, lying, being, or arising in or within the said county of Suffolk, and in the parishes of Lambeg and Glenary, in the county of Antrim in Ireland, or any part or parcel thereof respectively, clear of all taxes and outgoings whatsoever, parliamentary or parochial, and to commence from the death of the said Francis Seymour Conway, Earl of Yarmouth (the said testator), with such powers, remedies, and securities for the same as hereinafter in that behalf contained; the same annual sum or yearly rent-charge, annual sums or rent-charges, to be either perpetual or in fee, or payable for such time or times, for such purposes, and in such manner in all respects, as the said Francis Seymour Conway, Earl of Yarmouth, shall think proper, and shall, by the same or any other deed, instrument, or will, deeds, instruments, or wills, to be respectively executed and attested as aforesaid, direct or appoint."

The special verdict then stated the death of the said Francis, Marquis of Hertford, in 1822; and that, on the 6th October, 1829, his son, Francis Seymour Conway, then Marquis of Hertford, the testator, made a codicil to his will, whereby he limited to the use of Lady Strachan, during her life, the annual sum or yearly rent-charge of £700, to be issuing and payable out of, and charged and chargeable upon, all the hereditaments by the indenture of the 2nd of October, 1802, released, limited, &c. The special verdict then stated the death of Francis Seymour Conway, Marquis of Hertford, on the 1st of March, 1842, and the entry of his son, the present defendant, upon the lands described in the indenture of release, and that the sum of 386*l.* 19*s.* 10½*d.*, was demanded by the Crown as legacy duty upon the said annuity; and then referred for the opinion of the Court, in the usual form, the question whether legacy duty was payable or not in respect of the said annuity.

1845.
ATT.-GEN.
v.
Marquis of
Hertford.

1845.
 ATT.-GEN.
 v.
 Marquis of
 HERTFORD.

Crompton, for the Crown.—There is no question in this case as to the *amount*, or *how* the duty is to be chargeable; the only question is, whether this annuity of £700, bequeathed to Lady Strachan, a stranger in blood to the deceased, is or is not subject to legacy duty at all. It is contended on the part of the Crown that it is. First, it is money “charged upon the real or heritable estate” of the late Marquis of Hertford, within the meaning of these words in the 55 Geo. 3, c. 184, sched., part 3, title “Legacies,” clause 4. There can be no doubt that any direct bequest of this nature, in the form of a rent-charge, is to be treated as a bequest of a sum of money liable to legacy duty; and the liability cannot be got rid of by considering it as a devise of real estate: *Attorney-General v. Jackson (a)*. It is, for the purpose of the legacy duty acts, not land, but money charged on land. There is a class of cases within which the present appears to fall; where, the testator having a general and absolute power of disposition over the property vested in him, the original deed or other instrument is merely the machinery by which the party mentioned in the will obtains the entire enjoyment and benefit of the fund as his own property. Where the testator, having such a general disposing power, disposes of the property by his will, legacy duty is payable upon it. It would go to his creditors, if it were necessary, for the payment of his debts. In such a case the will is treated, not as in execution of a power under the original deed or will, but as an actual testamentary disposition of the property. Here the late Marquis of Hertford had, under the deed of 1802, an absolute and general power over this annuity; he might dispose of it for his own benefit; though he is tenant for life only of the estate out of which it issues, he has the rent-charge for himself, or for any other person on whom he chooses to bestow it, during his life or afterwards. The

(a) 2 C. & J. 101.

case, therefore, is governed by those of *In re Cholmondeley* (a) and *Platt v. Routh* (b), which established that a testamentary gift of personal property, over which the testator had, by deed or will, a general and absolute power of appointment, was subject to legacy duty. But, at all events, this annuity falls within the terms of the 45 Geo. 3, c. 28, s. 4, which subjects to legacy duty "every gift by any will or testamentary instrument, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, &c., or which shall have been charged upon, or made payable out of, any real estate, &c., of the person so dying, whether the same shall be given by way of annuity, or in any other form." This is clearly a gift by way of annuity, charged upon and made payable out of real estate. But it will be said that it is also within the terms of the proviso upon that clause, which is as follows:—"Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted, any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument, under any power given for that purpose by any such marriage settlement, or deed or deeds." Now this proviso shews beyond doubt, that the enacting part of the clause relates to a case like the present. Then is it taken out of the enacting part by the proviso? Can it be said that in this case there is a charge, by the deed of 1802, of any "specific sum of money, or share or proportion thereof," on real estate? The provision in that deed is not a provision for the appointing or apportioning of any specific sum of money. The charging of a "specific sum" must have relation

1845.
ATT.-GEN.
v.
Marquis of
HERTFORD.

(a) 1 C. & M. 149.

(b) 6 M. & W. 756.

1845.
 ATT.-GEN.
 v.
 Marquis of
 HERTFORD.

to a case in which the party is limited in amount, and where the instrument points out what he is to do. Here the testator had an absolute power of imposing any sum he pleased, in favour of any person, by way of rent-charge on the property, the only limit being that the amount should not exceed £700. The "specific sum" must surely mean some sum to be given in gross, by the will, to some other person, and cannot extend to a power of appointment like this, under which the Marquis might appoint the annuity or any part of it to his own use, or might appoint different annual sums, from year to year, to different persons. A rent-charge or annuity is not a specific sum within the meaning of the act. The fourth section clearly refers to the exercise of a power where the party has not the fee of the real estate, and the instrument gives him the power of creating an interest more extensive than he possesses in the real estate. And the proviso appears to be directed to the preventing sums in gross, which, by the original instrument, the settlor intends to be charged in favour of younger children, or other objects of his bounty from being liable to duty.

Lastly, this is, when the power is executed, personal property in equity, and subject as such to legacy duty. [On this point he cited *Bainton v. Ward* (a)].

Jervis, for the defendant.—The question in this case cannot be affected by the last argument, as to this being personalty in equity; the Legislature has now expressly dealt with legacies charged upon real estate as such. The question in truth depends altogether upon what is the proper construction of the stat. 45 Geo. 3, c. 28, s. 1. But before referring to that act, it is necessary to advert first to the previous act of the 36 Geo. 3, c. 52, s. 7, which defined what was to be considered a legacy, where given by way of appointment out of *personal* estate, and upon which the cases of *In re Cholmondeley* and *Platt v. Routh* were decided. That section enacts, "that any gift by any will

or testamentary instrument, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the meaning of this act, whether the same shall be given by way of annuity, or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, &c., except so far as the same shall be satisfied out of such real estate in a due execution of the will or testamentary instrument by which the same shall be given." Then the 45 Geo. 3, c. 28, s. 4, extends this provision to gifts by will or other testamentary instrument, which by virtue of such will &c. are charged upon or made payable out of the real estate. To be liable, therefore, as a gift made payable out of the real estate, it must be a gift by will, which gift, by virtue of the will, is charged on the real estate of the testator. Is this a gift by the will, which by virtue of the will is a charge on the real estate of the testator? Clearly not. In the case of the *Attorney-General v. Pickard (a)*, this point expressly arose. There the question was as to the amount of duty payable, which depended upon whether the first devisor, by whose will the power of appointment of the rent-charge was created, or the second devisor, by whose will the power was executed, was to be deemed the donor of the rent-charge. The Court held that the first devisor was the donor, applying the ordinary rule of construction, that the execution of the power is referred to and incorporated in the instrument by which it was created. So here, it is just as if the bequest of this annuity had been contained in terms in the deed of 1802. The gift to Lady Strachan is not by the last Lord Hertford; he only *selects* the per-

1845.
 ATT.-GEN.
 v.
 Marquis of
 HERTFORD.

(a) 3 M. & W. 552; S. C. in error, 6 M. & W. 348.

1845.
 ATT.-GEN.
 v.
 Marquis of
 HERTFORD.

son in whose favour it shall be applied by the original donor; and it is precisely the same in effect as if her name had been mentioned as the donee in the original deed. This, therefore, is not a gift *by will*. Nor is it payable out of any real estate "of the party so dying." Lord Hertford had no estate after his death, when the annuity attached. But for the power, he could not have affected the estate of the remainder-man at all. The 4th section is to be read thus:—"which, by virtue of such will &c., shall be charged upon, or made payable out of, any real estate of the party so dying." Now it is plain that the estate upon which this annuity is charged is not the estate of the testator, Lord Hertford, but the estate of his son, the present Marquis.

Then as to the proviso. In the case of *The Attorney-General v. Pickard*, in the Exchequer Chamber, the Court took occasion to express its opinion as to the construction of this proviso. Lord Denman, C. J., says—"The meaning of that proviso appears to me quite consistent with the view we are taking of this case; where the charge is not by will, but by deed, then the act has said that it shall not be considered as a *legacy*; it is a *gift* by a marriage settlement." If the original instrument creating the power be a *will*, the duty is paid in reference to that will if it be a *deed*, no legacy duty is payable at all. But it is said the proviso applies only where a gross specific sum is charged at all events by the deed, and the proportions of that charge are applied by the will. But surely a rent charge of £700 a year is a specific sum. The words of the proviso are fully satisfied by a charge of a specific amount the application of which by the will is in the power of the donee.

The cases *In re Cholmondeley* and *Platt v. Routh* are not authorities against the defendant, because they were decided on the ground that the testatrix in the former case, and the testator in the latter, had the entire disposition of

the whole corpus of the estate. But can it be said that the effect of this deed was to create a new real estate of £700 a year, by way of rent-charge? Clearly not. It is not *the testator's* real estate on which the annuity is charged, or out of which it is to be satisfied.

1845.
ATT.-GEN.
v.
Marquis of
HERTFORD.

Crompton, in reply.—It is obvious that the 45 Geo. 3, c. 28, s. 4, was passed with reference to powers of this description, given by deed, where the donee has no estate. The words, “or which such person may have the power to dispose of,” must refer to cases where no estate exists in the testator. And the decisions in *In re Cholmondeley* and *Platt v. Routh* proceed upon this principle. Why must the annuity be satisfied out of *his* estate? He has a power pro tanto of disposing of the estate, and that is sufficient to bring him within the words of the statute; it is not necessary for that purpose that he should have the whole estate. Secondly, this case is not within the proviso, because this is not a charge of a specific sum. A rent-charge cannot be so considered. It is given as part of the estate itself, and is uncertain in duration. The proviso applies only to a sum which is specific at the time of the creation of the power; where a sum to be afterwards appropriated or divided by the donee is specified in the instrument creating the power.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question raised in this case is, whether the appointment, by the codicil to Lord Hertford's will, of the annuity of £700 a year to Lady Strachan, pursuant to the powers contained in the deed of the 2nd October, 1802, be liable to legacy duty or not, under the 55 Geo. 3, c. 184.

That statute imposes a duty on every legacy given by

1845.
ATT. GEN.
v.
Marquis of
HERTFORD.

will, either out of the personal estate of the testator, or out of, or chargeable upon, his real estate, or out of monies to arise by the sale, mortgage, or other disposition of his real estate.

What is a legacy out of, or charged upon, the real estate of the testator, depends upon the construction of the 45 Geo. 3, c. 28, which first imposed a duty on such legacies, and is incorporated with the 55 Geo. 3 by the general provision contained in sect. 8 of that act. The material section of the 45 Geo. 3 is the fourth. It defines what a legacy of personalty is, as had been previously done by the statute of 36 Geo. 3, c. 52, and adds a definition of what a legacy is payable out of the real estate. It provides, "that every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon, or made payable out of, any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement, or deed or deeds, upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument, under any power given for that purpose by any such marriage settlement, or deed or deeds."

If we had to construe the first part of this clause only, without taking the proviso and subsequent section into consideration, we might probably have held that the appointment of the annuity to Lady Strachan was liable to duty. The case of *In re Cholmondeley* had already decided, that where a person had absolute power, under a settlement, to dispose of a sum of money by will, a gift by will of the whole of the sum in different portions to different legatees was liable to the legacy duty; and if, instead of a sum of money, the power had been to appoint an annuity charged upon personal estate, there would have been no doubt but that the gift of the annuity by will would have been liable to legacy duty, though the whole annuity had been given to one person. It cannot make any difference in this respect, whether a part of the fund which the testator has an absolute power to dispose of, or the whole fund, be given; the legacy is equally "satisfied out of" personal estate which the testator has power to dispose of as he should think fit.

If such be the construction of the fourth section in the part relating to personalty, it would be reasonable to put the same construction on the part relating to real estate; and therefore we should have probably held, that, this annuity itself being real estate which Lord Hertford had absolute power to dispose of, as the gift of a sum charged upon it, or of part of the annuity, would have been liable, so a gift of the whole would. Still, however, there would have been a difficulty in fixing the defendant in this information with the duty under sect. 5, because, if the annuity *itself* was the "real estate" which the late Marquis had the power to dispose of, the defendant, the present Marquis, was not the person entitled to *that real estate*. He was entitled to an estate for life in the real estate *charged* with the annuity; but *that* real estate the late Marquis had no power to dispose of.

The proviso which follows, however, creates a further

1845.
ATT.-GEN.
v.
Marquis of
HERTFORD.

1845.
 ATT.-GEN.
 v.
 Marquis of
 HERTFORD.

difficulty, which we cannot get over; and, reading the whole clause together, we think that the intention of the Legislature to render such a gift as this liable is, at all events, not so clearly expressed as that we ought to decide against the defendant. It is a settled principle, that the subject ought not be charged with a duty, except by words clearly imposing it. It is extremely probable, that the framer of the clause intended to protect provisions for families only out of pecuniary charges on real estate by antenuptial or postnuptial marriage settlements; especially when we bear in mind, that the 45 Geo. 3, c. 23, first imposed a duty on legacies to children or their descendants: and it is likely that the large words were introduced with a view of completely securing the object. But we cannot act upon such a conjecture. The words embrace every charge by deed of a specific sum or sums; and if the proviso protects an appointment by will, where the charge is of £700 in one sum, it is difficult to conceive why it should not equally apply to any number of sums of £700 payable annually. Mr. *Crompton* however contended, that the words "specific sum" only applied to charges of sums certain, the precise amount of which was ascertained by the deed or settlement. But we have a difficulty in understanding why the Legislature should mean to give an exemption where the charge was £700 certain, and to take it away where it was a charge of £700, or less, at the option of the donee of the power. Indeed, Lord *Denman* has already intimated his opinion, in delivering the judgment of the Court of Exchequer Chamber, in error, in *Pickard v. The Attorney-General*, that charges of this nature (for the charge there was of an annuity not exceeding a certain amount) would be exempt, if originally made by deed, under this proviso.

For these reasons, we are of opinion that our judgment must be for the defendant.

Judgment for the defendant.

1845.

LUMLEY v. DUBOURG.

June 12.

THIS was a rule for judgment as in case of a nonsuit. The plaintiff, having given a peremptory undertaking to proceed to trial at the London Sittings after Easter Term, gave notice of trial accordingly, and entered the cause and carried in the record in due time. It appeared also that : was made a special jury cause; but, as was sworn, not for the purpose of delay. There were only two days' sitting, and from press of business the cause was made a remanet to the sittings after the present term; but on the second day of this term (May 23) the defendant obtained the above rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to the peremptory undertaking. On the 28th of May, *Hoggins* obtained a rule calling upon the defendant to shew cause why that rule should not be discharged, and the peremptory undertaking enlarged to the sittings after this term. The affidavits filed in answer to this rule stated, that, although notice of trial was given for the 2nd of May, the cause was not entered until the 8th, which was the last day for entering causes for trial at those sittings; that the cause when entered was No. 20 in the list, and that only five causes remained undisposed of at those sittings.

The plaintiff, having given a peremptory undertaking to try at the London Sittings after Easter Term, gave notice of trial accordingly, and entered the cause, which had been made a special jury cause, on the last day for entering causes for trial at those sittings, and the cause stood No. 20 in the list; but there being only two days for the sittings, it was, with four others, made a remanet to the sittings after Trinity Term : —*Held*, that under these circumstances, the plaintiff was not in default, so as to entitle the defendant to judgment as in case of a nonsuit for not proceeding to trial pursuant to his undertaking.

Ogle now shewed cause.—The defendant is entitled to judgment, as the plaintiff has failed to perform his undertaking. It is only by the favour of the Court that the plaintiff is permitted to try the cause upon giving such undertaking, for, in strictness, the defendant was before entitled to judgment. The undertaking, when given, is peremptory, to try absolutely and at all events; and, the cause not having been tried at the time named, the plaintiff

1845.
 LUMLEY
 v.
 DUBOURG.

is in default. And the defendant's affidavits also shew, that the plaintiff did not use due diligence to get the cause tried, but so far from doing so, neglected to enter it until the last day, in consequence of which it stood No. 20 in the list; and he further impeded the trial, by making it a special jury cause. In *Ward v. Turner* (a), where, the plaintiff being under a peremptory undertaking to try at the summer assizes, and the cause was made a remanet in consequence of the illness of the judge, the plaintiff gave notice of trial for the spring assizes, which was afterwards withdrawn, and the defendant, in Easter Term, obtained a rule absolute for judgment as in case of a nonsuit, a rule having been obtained to set that judgment aside, *Coleridge, J.*, said, "Here the plaintiff had failed to take the cause down for trial, and been in default, and the defendant consequently had a right to his remedy under the statute, and had a rule nisi accordingly. That rule was discharged, not because it was improperly obtained, but on condition of the plaintiff undertaking to try the action at the next assizes. Then comes the question, whether there was any default on the part of the plaintiff at the next assizes. In one sense there was none, as there was no moral fault, and no neglect on his part; but in the sense of a condition, it was a peremptory undertaking to be responsible, though he had no control over the circumstances which prevented the trial. The plaintiff should have applied in Michaelmas Term to enlarge his peremptory undertaking, and, if that had been done, no doubt the Court would have looked into all the facts of the case. The only use of the subsequent default is to see how far the plaintiff may be excused, and whether he is entitled to an extension of time. I think, therefore, that it was not an irregularity for the defendant to sign judgment as in case of a nonsuit two terms after." That ca

(a) 5 Dowl. P. C. 22.

in point, and is decisive of the present. [*Alaerson*, B.—How can it be said that the plaintiff *neglected* to try, within the meaning of that word in the stat. 14 Geo. 2, c. 17, s. 1, when it was in consequence of the illness of the judge that the cause was not tried? *Pollock*, C. B.—That decision seems to have been made without adverting to the terms of the statute.] This case is stronger in that respect; for here it was the plaintiff's default that the cause was not tried, as he neglected to enter the cause in due time, so as to be set down early enough in the list to be tried at those sittings. In a recent case in the Common Pleas, *Petrie v. Cullen* (a), the plaintiff, being under a peremptory undertaking to proceed to trial at a particular sittings, set down the cause for trial on the evening of the last day allowed for so doing, and from press of business it was made a remanet; the plaintiff having taken no steps in the following term to enlarge or discharge his peremptory undertaking, the defendant obtained judgment in case of a nonsuit, and the Court refused to set it aside.

Hoggins, who appeared in support of the rule, was not called upon.

POLLOCK, C. B.—In the course of this term, we had occasion to look into the form of a peremptory undertaking, and to consider the case of *Petrie v. Cullen*, but, on inquiry, we found that that case was decided on the special circumstances of the case, there having been an actual default. Where a plaintiff gives a peremptory undertaking, he thereby undertakes to proceed to the trial of the cause according to the practice of the Court. How, then, can it be said that he neglects to do so, when he is ready to try, but, from the illness or by the act of the

1845.
LUMLEY
v.
DUBOURG.

(a) 14 Law J., N. S., C. P., 29.

1845.
 LUMLEY
 v.
 DUBOURG.

Judge, the cause is made a remanet? It may have been that if, in this case, the plaintiff had entered the cause sooner, it would have been tried; but a party having a particular time to enter a cause, he is entitled to the whole time which the course and practice of the Court allows for that purpose, and it cannot be negligence in a suitor if he neglects to enter it sooner than the practice requires. The rule will, therefore, be absolute to set aside the judgment signed, and enlarge the peremptory undertaking until the sittings after the present term; but we think it ought to be without costs.

ALDERSON, B.—I am of the same opinion. It is always useful to revert to original principles; and we should therefore look to the statute on which the practice in question is founded. Now, by the first section of the 14 Geo. 2, c. 17, it is enacted, that “when any issue is joined in any action or suit at law in any of his Majesty’s Courts at Westminster, &c., and the plaintiff in any such action or suit shall neglect to bring such issue on to be tried according to the course and practice of such courts respectively, it shall be lawful for the judge or judges of the said courts respectively, at any time after such neglect, &c., to give the like judgment for the defendant as in cases of nonsuit, unless the said judge or judges shall, upon just and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time or times so allowed, then and in every such case the said judge or judges shall proceed to give such judgment as aforesaid.” Now, how can a plaintiff be said to neglect to try an issue, when its not being tried was the act of the judge, over which he had no control? It is argued, however, that a peremptory undertaking is an undertaking to try at all events; but that is not so, for the rule discharging a rule for judgment as in case of a nonsuit, on the plaintiff’s giving a peremptory

undertaking, is properly the act of the Court, which gives the plaintiff additional time to try the cause. In the first part of the section, the same word "*neglect*" is used; but it is the established practice, that where a plaintiff has made no default, but takes his cause down for trial, and it is made a remanet, the defendant cannot have judgment as in case of a nonsuit, but must, if he is anxious to have the cause tried, take it down by proviso (a); the reason of which is, that there has been no neglect to proceed to trial according to the course and practice of the Court. Then, it having been decided not to be a *neglect* within the meaning of that word in the first branch of the section, what reason is there for putting a different construction on the latter part of the section? I can see none. With respect to the case of *Petrie v. Cullen*, I spoke to the Chief Justice about it; and he said it was decided on the special circumstances of the case, and there had been an actual neglect on the part of the plaintiff.

PLATT, B., concurred.

Rule absolute, with costs.

(a) See *King v. Pippet*, 1 T. R. 492.

1845.
LUMLEY
v.
DUBOURG.

1845.

June 11.

The ATTORNEY-GENERAL v. BROWN.

An information at the suit of the Attorney-General stated, that the Queen was seised in her demesne as of fee of Waltham Forest, and that the Queen and her ancestors had enjoyed the said forest, and the game of beasts and fowls of forest, chase, and warren therein, and all rights &c., appertaining thereto, without disturbance, until the defendant unlawfully made a fence and ditch on the soil of the forest, and inclosed five acres thereof, and separated the same from the residue of the forest, and encroached and usurped thereon, to the great injury and disturbance of the Queen in her said forest, to the damage and destruction of the vert and venison therein, and to the disinherison of the Queen :—
Semble, that a general plea of not guilty might be pleaded to this information.

THIS was an information at the suit of the General, which stated, that, before and at the time committing of the trespasses &c., our lady the Queen and still is, seised in her demesne as of fee in right of crown of England, of and in a certain forest, called Waltham Forest, within the county of Essex; and the Queen and all her ancestors, kings and queens of England, and their assigns, continually held and enjoyed the said forest, and the game of wild beasts and fowls of forest, chase, and warren, coming and arising of and in the said forest, and all rights, profits, privileges, liberties, franchises appertaining thereto, until &c., and that the defendant still of right ought to have and enjoy the said forest, the said game, and the said rights, profits, privileges, and franchises, in as full and ample a manner as has been always accustomed; yet that the defendant did, without any lawful warrant, right, or title in that behalf, the defendant inclosed, and made a high fence, and dug and made a ditch, in and upon the soil of the said forest, to the south and around, to wit, five acres of land, situate and being parcel of and within the said forest, and the defendant inclosed a great part, to wit, the said five acres, of the said forest, and encroached and usurped thereupon, and separated the same from the residue of the said forest, wrongfully and unjustly kept and continued the same as was erected, and the said ditch so dug as aforesaid, and the defendant of the said forest so separated and encroached and usurped upon as aforesaid, from thence hitherto; whereof the reason of the premises, our lady the Queen cannot have and enjoy the said forest, and the said game, and the said rights, profits, privileges, liberties, and franchises.

and ample a manner as she of right ought to have and enjoy the same; to the great injury and disturbance of our said lady the Queen in the said forest, to the great damage and destruction of the vert and venison of and in the said forest, to the disinherison of our said lady the Queen in the premises, and contrary to the laws in that behalf, &c.

Plea, not guilty. Demurrer, and joinder.

The point stated for argument on the part of the Crown was, that the plea was not pleaded according to the rules of law which applied to pleadings against the Crown; and that the plea ought to shew a sufficient title in the defendant, if it was intended to rely upon such title against the Crown.

Jervis, for the Crown.—It may be admitted, that, if this had been an information of intrusion at the suit of the Crown, the plea of not guilty would have been admissible, the subject being expressly allowed by the stat. 21 Jac. 1, c. 14, to plead that plea to an information of intrusion: *Porter's Case* (a). But this is an information in the nature of an action on the case, in which there is no statute to enable the subject, as against the Crown, to plead not guilty, but he is bound to shew his title specially. The Crown does not claim the soil of the forest itself, but only certain forestal rights over it, and therefore it may possibly be considered advisable to amend the information, by stating, not that the Queen is seised *in her demesne* as of fee of the forest, but merely that she is seised as of fee; but whether this amendment be made or not, the defendant is not at liberty to plead as he has done. Nor can he maintain a right to plead not guilty by virtue of the stat. 21 Jac. 1, c. 4, s. 4, which applies only to informations on penal statutes. [*Pollock*, C. B.—No; that statute has cer-

1845.
ATT.-GEN.
v.
BROWN.

(a) 1 Rep. 17 a.

1845.
 ATT.-GEN.
 v.
 BROWN.

tainly nothing to do with the present case.] He therefore remains as at common law, according to which, and to the ancient course of the Exchequer, "if in an information of intrusion into lands or tenements the defendant plead not guilty, he shall lose the possession;" because in that case "the king's learned counsel cannot know the defendant's title, to provide to answer the same, as the defendant may do to the king's title:" 4 Inst. 116.—[He cited also Manning's Exchequer Practice (Revenue Branch) 198, and Vin. Abr., Forest, (F).]

Willes, for the defendant, was not called upon.

PER CURIAM.—Without expressing any decided opinion on this point, we certainly cannot say that this is a bad plea. The defendant may have no intention of setting up title in himself, but merely of denying that he committed the act in question.

Jervis then intimated that the Crown would amend.

1845.

CHAPPELL v. PURDAY.

June 12.

CASE for the infringement of the plaintiff's copyright in a musical composition, being the overture to an opera called "Fra Diavolo." There were pleas denying the existence of the copyright claimed, and that the plaintiff was the proprietor thereof.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after Trinity Term, 1844, the following facts were proved :—

In the year 1829, M. Auber, being a subject of France, and residing at Paris, composed there the overture to "Fra Diavolo," and shortly afterwards assigned it to a M. Troupenas, who, by an instrument in writing, dated the 28th of January, 1830, assigned it to M. Latour, a denizen in England. The opera was represented, and the overture played, at the Opéra Comique in Paris, before such assignment to Latour. On or about the 9th of February, 1830, the overture was entered at Stationers' Hall, in the name of Messrs. D'Almaine & Co., who were in correspondence with Troupenas. On the 13th of February, 1830, Latour, in Paris, sold the copyright of the overture in England to the plaintiff, Mrs. Chappell, by a memorandum in writing, not under seal, but which was by the French law a valid and perfect assignment. On the 5th of March, 1830, the overture was printed and published in Paris. On the 2nd of June, 1836, Latour, Auber, and Troupenas, joined in an indenture whereby they assigned to the plaintiff the copyright in England; and on the 14th May, 1840, the plaintiff published the music in England. The defendant afterwards, without the license of the plaintiff, published copies of the overture in England, for which publication this action was brought.

The plaintiff tendered in evidence certain depositions

A foreign author, residing abroad, who composes and publishes his work abroad, has not, at common law, or under the stats. 8 Anne, c. 19, and 54 Geo. 3, c. 136, any copyright in this country.

Therefore, a person to whom he transfers abroad, by an instrument, not under seal, but which is valid according to the law of that country, the copyright of the work in England has no right of action against a British subject who afterwards publishes the work in England.

Where depositions in a suit in equity are given in evidence at law, and the bill and answer are also put in to shew that the depositions are admissible in evidence, the opposite counsel has no right to refer to the bill and answer in his address to the jury.

1846.
 CHAPPELL
 v.
 PURDAY.

taken in a suit in equity relating to the same matter. The reading of these depositions was objected to, unless the bill and answer, which also were put in by the plaintiff, were allowed to be read by the defendant's counsel, and to be referred to by him in his address to the jury. The learned Judge received the depositions in evidence, but would not allow the defendant's counsel to make use of the bill and answer in his address to the jury.

It was contended on behalf of the defendant, that the plaintiff had no right of action; for that a foreign author, residing abroad, composing a work there, and first publishing it there, could not communicate to another person any exclusive copyright in such work in England; and that even if he could, the assignment of the 13th of February, 1830, to the plaintiff was invalid, not being by *deed*, nor being attested by two witnesses, pursuant to the 8 Ann. c. 19. The Lord Chief Baron reserved these points for the consideration of the Court, and the plaintiff had a verdict: leave being reserved to the defendant to move to enter a nonsuit, or a verdict for him on the issues denying the copyright and the proprietorship.—In last Michaelmas Term,

Jervis moved for a rule upon the points reserved, and also for a new trial, on the alleged ground of the improper reception of the depositions in evidence. He contended with respect to the latter point, that he ought to have been permitted to refer to the bill and answer in his address to the jury at the trial, and cited *Edwards v. The Earl Glengall* (a).

PER CURIAM.—There will be no rule on this point. The learned counsel was not entitled to read and make use of the bill and answer in his address to the jury; the judge

(a) 9 Law J., N.S., Exch., 65.

only is to look at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit.

1845.
CHAPPELL
v.
PURDAY.

On the other points a rule was granted, against which, in the same term (Nov. 15 and 16),

Martin, Byles, Serjt., and E. James shewed cause.—The question is, whether, under the circumstances of this case, the plaintiff had any title to this copyright as against a person who has pirated the composition and published it in England: and it is contended that she clearly has. It was proved that, by the law of France, this copyright exists; and it was also proved that the assignment made by Latour to the plaintiff was a valid assignment according to the law of that country. In *Donaldson v. Beckett* (a), in the House of Lords, eight of the Judges were of opinion that an author had a right at common law to the exclusive publication of his work in the first instance. And in *Bentley v. Foster* (b), the Vice-Chancellor of England was of opinion that protection was given by the law of copyright to a work first published in this country, whether it was written abroad by a foreigner or not. In *D'Almaine v. Boosey* (c), also, it was expressly held, that the English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. That decision is precisely in point, and is identical with this case, as to the facts on which the judgment of the Chief Baron there proceeded. The case of *Delandre v. Shaw* (d) will be relied on for the defendant; but the observation of the Vice-Chancellor in that case, that the Court “does not protect the copyright of a foreigner,” was extra-judicial, and the case itself has no

(a) 4 Burr. 2408.

(b) 10 Sim. 320.

(c) 1 Y. & C. 288.

(d) 2 Sim. 237.

1845.
 CHAPPELL
 v.
 PURDAY.

bearing on the law of copyright. The case of *Page v. Townsend* (a), where the Vice-Chancellor appears to have held that *prints*, engraved and struck off abroad, but published here, are not protected from piracy, is clearly distinguishable; and was put on the ground that the statutes there referred to were expressly passed to protect those works which were designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, or worked abroad, and only *published* in Great Britain. The case of *Clementi v. Walker* (b) is also distinguishable from the present; for the judgment proceeded altogether on the ground that the original transfer to the plaintiff of the copyright in this country was merely by parol, and that there was not any assignment or consent in writing from the author previously to the publication by the plaintiff. If the plaintiff had a title to the copyright of this work, how could that title be affected by a publication in Paris over which she had no control? It is not meant to be argued that the bringing of a copy, bonâ fide, from Paris of this publication, would be an infringement of the plaintiff's right; but the question is, whether the defendant has a right to publish it here. It cannot be that an act done by a foreigner in Paris, behind the back of the plaintiff, can be of any avail to affect her right. On this case coming before the Lord Chancellor, sitting in equity (c), this question arose, whether after a foreigner has published his work in a foreign country, he can, at common law, assign his copyright limited to Great Britain, to a British subject, so as to give the assignee the benefit of the statute relating to copyright; and his Lordship came to the conclusion that Mr. Chappell had that right. It is quite indifferent to the plaintiff, whether she takes the right under the statute of Anne or at common law. There is, at all events, nothing

(a) 5 Sim. 395.

(b) 2 B. & Cr. 861.

(c) 4 Y. & C. 485.

in that statute which takes away her right. The true view of this subject appears to be, that a *British subject* has a complete and perfect copyright in his own production; that a *foreigner* has an *imperfect right, defeasible* by prior publication in this country by another person; and that a *pirate* has no right at all. All, therefore, that M. Auber had to do, in order to secure his right, was to take care that he was not anticipated by a prior publication here. Then, *Bentley v. Foster*, and the former decision in *Chappell v. Purday*, are direct authorities to shew that he may assign his right to a British subject. Did he then assign it to the plaintiff by a valid instrument of assignment? It is said that this instrument amounts, not to an assignment, but to a mere license. [*Pollock, C. B.*—They say, because it professes to be an assignment of a limited interest only in the copyright, namely, in the United Kingdom, it therefore can operate only as a *license* to publish the work within those limits.] The answer is, that wherever the common-law right exists, the statute fastens on and applies to it; and therefore, where there is the common-law right abroad, the statutable right may be created here. It may be said, however, that the author cannot make such limited assignment himself, keeping the copyright as to the rest of the world. But *D'Almaine v. Boosey* is an authority that this may be done; for though the objection was not distinctly taken in that case, the assignment was held valid. It is clear and admitted, that a foreigner who first publishes *here* has a copyright here. Can it be said that he thereby loses his copyright abroad? On the other hand, if the common law takes no notice of the right abroad, then what M. Auber reserves to himself here is so small a quantity of interest that the law takes no notice of it, and it is the same as if the whole had been assigned. But further, it is objected that, at common law, such a right is not assignable. The definition of a chose in action, which is incapable of assignment, is given

1845.
 CHAPPELL
 v.
 PURDAY.

1845.
 CHAPPELL
 v.
 PURDAY.

in the *Termes de la Ley*, 121: "when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, &c.; and because they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action." The very terms of the statute of Anne shew that copyright was assignable in perpetuity at common law; for it applies to "the author of any book or books already printed, who *hath not transferred* to any other the copy or copies of such book or books, &c., or the bookseller or booksellers, &c., who hath or have *purchased or acquired* the copy or copies of such book or books, in order to print or reprint the same." Copyright was always treated as personal property, and made the subject of bequest and assignment. In *Tbisson v. Walker*, cited in *Millar v. Taylor* (a), there had been an assignment of the copyright in the year 1607. In *Shep. Touchst.* 231, it is said, "most chattels, real and personal, may be given and granted without deed." [They referred also to Jarman's edition of Bythewood's *Conveyancing*, Vol. 7, p. 645, notes.] This, therefore, being a valid contract by the law of France to transfer the property in this unpublished work, which was of the nature of personalty, was equally a valid contract at common law to confer the right of publication here. Mr. Justice *Story*, (*Conflict of Laws*, s. 262, p. 219), speaking of contracts required by law to be in writing, says, "If such contracts, made by parol (*per verba*), are sought to be enforced elsewhere, they will be held void, exactly as they are held in the place where they are made. And so the like rule applies, *vice versâ*, where parol contracts are good by the law of the place, but would be void, if originally made in another place, where they are sought to be enforced, for want of *certain solemnities*, or for want of being in writing."

(a) 4 Burr. 2325.

Now here it is undisputed, that the first contract would vest the property in France; then the plaintiff comes to England with that property, and *D'Almaine v. Boosey* is an authority that she retains the same right here.

1845.
CHAPPELL
v.
PURDAY.

Then as to the supposed necessity for two witnesses to the assignment, it is sufficient to say that there are no words in the acts of Parliament requiring it. The argument can only be founded upon the dictum of Lord *Ellenborough*, in *Power v. Walker (a)*, that, inasmuch as the statute of Anne requires the *consent* of the proprietor, in order to authorize the printing of any book by another person, to be in writing, the necessary conclusion from it was that the assignment must also be in writing; but the answer is, that there is no such requisition in the statute. But even supposing the original instrument of assignment to be invalid, the plaintiff's right is not affected thereby; because there was no publication here, except by Auber, and the person claiming under him here, (which is in effect by himself), before the assignment to the plaintiff by deed. That assignment alone, therefore—there having been no adverse publication before it—made the plaintiff's title perfect.

In the same term (Nov. 16 and 17), and in Hilary Term (Jan. 23),

Jervis, *Godson*, and *Crompton* were heard in support of the rule.—This is undoubtedly a question of great importance, and is not directly affected by any decided case. And the Court may determine it in the defendant's favour, without at all embarking upon the question as to the title of a foreigner in copyright: for if the instrument of the 13th of February, 1830, was no valid assignment from Latour to the plaintiff, the case falls entirely within the decision

(a) 3 M. & Sel. 9.

1845.
 CHAPPELL
 v.
 PURDAY.

in *Clementi v. Walker* (a); because, in such case, whatever title Auber transferred by the contract of the 12th of January, 1830, the plaintiff had none until the year 1836, and before that time there had been a complete publication in France, and so the case is governed by *Clementi v. Walker*. That circumstance prevents its being an English publication, and makes it a foreign one. It is necessary, however, to enter into the general question; and first, as to the authorities which already exist on this subject. *Millar v. Taylor* (b) and *Donaldson v. Beckett* (c) decided only, at most, that a natural born subject may have at common law a perpetuity of copyright. In the former case, it was expressly found by the special verdict, that the author of the work was a British subject, resident in England; and that appears to have been deemed by the Court a necessary ingredient in the finding. So, *Bentley v. Foster* (d) established only that a foreigner residing and publishing in this country is protected against piracy; the Vice-Chancellor declined to give any opinion on the large question, whether a foreigner residing abroad has a copyright here. And *D'Almaine v. Boosey* (e) is no authority for the plaintiff. There it was even doubted whether, if a foreigner came and published his work here, he had a copyright; but no opinion was given upon his abstract right. In *Chappell v. Purday* (f), Lord Abinger no doubt intimated an opinion that the foreigner has such right, under the equitable construction of the statute of Anne. But the reason assigned by his Lordship, that, though the statute was made for the protection of British subjects, the same reasons apply to protect a foreigner, for that "we must presume that the foreign law would do the same for him," can hardly be maintained. The case of *Gwi-*

(a) 2 B. & Cr. 861.

(b) 4 Burr. 2303.

(c) Id. 2408.

(d) 10 Sim. 320.

(e) 1 Y. & C. 268.

(f) 4 Y. & C. 485.

Chard v. Mori (a) is a strong authority for the defendant. That case establishes, that as soon as a work is published abroad, if that be before a positive publication here, it becomes *publici juris* here, subject to the author's right to enforce in this country any *contract* relating to it, although made abroad. *Delandre v. Shaw* (b) is certainly only thus far an authority, that it contains an expression of opinion on the part of the Vice-Chancellor—undoubtedly not necessary to the decision of the case—that the legal right does not exist in a foreigner. *Page v. Townsend* (c) is also to a certain extent an authority for the defendant. That case turned upon the statutes 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, for protecting property in *prints*, which are in *pari materia* with the copyright acts: and there the Vice-Chancellor says,—“It is plain that the object of the Legislature was, to protect those works which were designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, etched, or worked abroad, and only published in Great Britain,” and founds himself upon the authority of *Clementi v. Walker*. These are all the cases on this subject, with the exception of *Clementi v. Walker*; they certainly are to some extent conflicting, but none of them is directed expressly to the principal point in the present case.

The authorities, therefore, being thus meagre on the subject, it becomes necessary to consider the question how far there can exist, in a foreigner residing abroad, any *common-law* right such as is now claimed. In considering it, the distinction between *patents* and *copyrights* must not be forgotten. The statute of Anne has been said to apply to a person who *brings from abroad* the fruits of his study and invention; *Edgeberry v. Stephens* (d); because, quoad this country, he is deemed the first and true inventor.

1845.
CHAPPELL
v.
PURDAY.

(a) 9 Law J., Chanc., 227.

(b) 2 Sim. 237.

(c) 5 Sim. 395.

(d) 2 Salk. 447.

1845.
 CHAPPELL
 v.
 PURDAY.

Can, then, a foreigner restrain a British subject from publishing here a work which he brings from France? Could Auber, who composed and published abroad, have sued a person who bought the composition in France, and published it here? No; because the municipal law of this country recognises this country only. [*Pollock*, C. B.—They say it was originally published in this country by Auber.] It was not so, but by the plaintiff as the mere agent of Latour. But can the foreign composer do indirectly that which he cannot do directly? If *he* cannot restrain the free publication of the work here, can his assignee? He cannot stand higher than the original composer who assigned to him. The common law of England affixes, as incident to the composition, a perpetual right of copy; the law of France affixes to it a different right: how can the composer clothe a publisher in England with that foreign right? The French law, with all its incidents, can be in force only in that country. The incident exists only by the application of the common law of the country, which can avail only in that country, and within the ambit of the jurisdiction of that law. [*Parke*, B.—The French law of copyright surely cannot give a Frenchman any copyright here, or any right of action for its infringement here; whether it be by common law or statute, it cannot have any extraterritorial power. Then does the English law give him any such right?] In truth, the question comes to this, whether, by the English law, a foreigner, publishing abroad, has any copyright here; and upon general principles, it would seem to be clear that he has not. It is a mere municipal right, which the law of the country attaches to the composition, namely, the right of multiplying it; which may vary in every country. The obvious argument to be drawn from the International Copyright Act, 1 & 2 Vict. c. 59, is that, independently of it, the foreign author had no copyright. It is admitted, that, if there had been a previous publication in France, the com-

poser of this work would have no copyright in England. But how can he have a common-law *English* right, which an act done *abroad* can destroy? M. Auber publishes his MS. in France; a British subject brings a copy to England, and multiplies it, which it is admitted he may do; then Auber makes an assignment to another British subject, out of what is called his British right: so that, according to the plaintiff's argument, there may be two sets of copies running together, both legal, in altogether different rights. Again, suppose Auber never printed the MS., but only played the music at the theatre; and an Englishman present took down the notes, and brought the music to England: he has a right to multiply copies for his own use; can he then afterwards be made liable as for an infringement, by a subsequent assignment by Auber to an Englishman? [*Parke, B.*—How can the common law of France—which is only like an old statute—give a Frenchman a right of publishing a book in England, and excluding all Englishmen from publishing it in England? How can the French municipal law have an extraterritorial power?]

Nor can the plaintiff assert any right under the statute of Anne, which is expressly confined to authors of books printed or to be printed in this country, and accordingly makes provision for the deposit of copies in certain English libraries. And the 7th section expressly enacts, that nothing in the act contained shall extend to prohibit the *importation*, vending, or selling of any books, in any foreign language, printed beyond the seas. Yet it is now said this very statute gives to a foreigner the exclusive right of selling such a book in England. Thus the same law expressly *allows* the importation of works from abroad, by which it is now said in effect to be *prohibited*. [*Parke, B.*—It would seem that, to bring himself within the statute of Anne, it must be the *author* who first publishes in England, or the assignee of that author.] *Clementi v. Walker*

1845.
 CHAPPELL
 v.
 PUNDAT. .

1845.
 CHAFFELL
 v.
 PURDAY.

is an express decision, that a publication by a third party prevents the right of the foreigner here.

Next, as to the validity of the assignment of 1830. This is a right which, at common law, could pass only by deed. And the recent statute respecting copyright, 5 & 6 V. c. 45, s. 13, after providing, that it should be lawful for the registered proprietor to assign his interest, or any portion of it, in the copyright, by making an entry in the book of registry of such assignment, enacts that "an assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to a stamp or duty, and shall be of the same force and effect *if such assignment had been by deed*;" which is an exposition of what the law then was, and from which it is to be inferred that, before it, an assignment, in order to be valid, must be by deed. The *copyright* is not the property which, as has been contended, will pass by delivery, but the *copy*—the *manuscript*. The possession of that cannot give the party the right of multiplying copies; that is a right attached to the *authorship*. It is like the right which a ferry or a market gives to the owner, which is altogether incorporeal. The question discussed in *Millar v. Taylor* was not as to the nature of the assignment, but as to the right of the author; and it appears that the assignment in that case was by custom, under the authority of the bye-laws of the Company of Stationers. Many other rights are of an incorporeal nature, and must pass by grant, besides those which issue out of land: see *Sheep Touchst.* 231. But, if this assignment be within the statute, it amounts to a license only. Could there be a subdivision of a copy or patent right in various districts in this country? There may for that purpose be a *license*, but then the licensor is the party to bring the action. Could M. Auber sue a person who brought a copy from England to the colonies or France, and published it there?

All such difficulties are got rid of by construing this to be a license, reserving the right of suit to the grantor. Lastly, in order to transfer the right, there must be an actual sale, — the property must pass; whereas this is a mere contract to sell, giving merely an equitable right to a specific performance; and before it was carried into effect by the legal assignment in 1836, there was a publication in France, and by the plaintiff (who was then legally unauthorized) in England; and in this state of circumstances, the doctrine of *Clementi v. Walker* strictly applies, and is decisive of the present case.

1845.
CHAPPELL
v.
PURDAY.

Cur. adv. vult.

The judgment of the Court was now pronounced by

POLLOCK, C. B.—This was an action for the infringement of the copyright of the music of the opera of “*Fra Diavolo*,” claimed by the plaintiff. The pleas denied the copyright claimed, and denied that the plaintiff was proprietor of it. The material facts, as they appeared in evidence at the trial, are, that in 1829, Auber, a Frenchman, composed at Paris the overture to “*Fra Diavolo*,” which is the subject of the present action. Soon after, Auber assigned it to Troupenas; and Troupenas, on the 12th of January, 1830, sold it to Latour, a denizen of England, by an instrument in writing, dated the 28th of January, 1830. There was a representation of the piece, and the overture was played, at the Opéra Comique in Paris. About the 9th of February, 1830, there was an entry at Stationers’ Hall, in the name of D’Almaine & Co., who were in connexion with Troupenas. On the 13th of February, 1830, Latour, in Paris, sold to the plaintiff, by memorandum in writing, not under seal (which was proved at the trial to be good and valid by the French law), the copyright in England. On the 5th of March, the overture was printed and published at Paris. On the

1845.
 CHAPPELL
 v.
 PURDAY.

2nd of June, 1836, Latour, Auber, and Troupenas, by indenture, assigned to the plaintiff the copyright in England, and on the 14th of May, 1840, the plaintiff published the music in England; subsequently to which the defendant published copies in England, for which this action was brought.

Two questions of importance were raised in the course of the argument. The first is, whether, at common law, a foreigner, residing abroad, and composing a work, has a copyright in England. The second is, whether such foreign author, or his assignee, has such a right by virtue of the English statutes.

Upon the first question we do not feel any difficulty; and we are of opinion that a foreign author, residing abroad, and publishing a work there, has not by the common law of England any copyright here.

A *copyright* is the exclusive right of multiplying copies of an original work or composition, and consequently preventing others from so doing. The general question, whether there was such a right at common law, was elaborately discussed in the great cases of *Millar v. Taylor* (a) and *Donaldson v. Beckett* (b). In *Millar v. Taylor*, it was decided by Lord Mansfield, Mr. Justice Aston, and Mr. Justice Willes, that at common law such a copyright existed, and the judgment was given for the plaintiff; and in *Donaldson v. Beckett*, which was an injunction founded upon the judgment in *Millar v. Taylor*, the majority of the judges held that such a common-law right existed; but the majority also held that it was taken away by the statute of Anne. We are, however, all of opinion that no such right exists in a foreigner at the common law, but that it is the creature of the municipal law of each country, and that in England it is altogether governed by the statutes which have been passed to create and regulate it, as in France it must be

(a) 4 Burr. 2303.

(b) *Id.* 2408; 2 Bro. P. C. 129.

governed by the law of that country; but such a law has no extraterritorial power, and cannot be enforced beyond the limits of the state. Admitting, therefore, that by the law of France no one can, against or without the consent of the author, make or print any copy of his work, at any time or in any place, no right can be claimed in this country as founded upon such a law, nor can any right be claimed here, except what can be supported by the law of this country. The subjects of this country are not bound to obey such a law of France, nor the courts of this country to enforce it. It follows, that a British subject may, at the common law, freely print and publish in Great Britain any number of copies of a French work, without being exposed to an action at the suit of the French author, whose exclusive privilege, founded upon the French law, is limited by the French territory: and indeed, if this were not so, the attempt to establish international copyright by treaty would have been altogether unnecessary.

A foreign author having, therefore, by the common law, no exclusive right in this country, the only remaining question is, whether he has such a right by the statute law: and this depends on the construction of the statutes relating to literary copyright which were in force at the time of the transaction in question, namely, the 8 Anne, c. 19, and 54 Geo. 3, c. 136.

If a judicial construction had been put upon these statutes by a direct and deliberate decision of any court, we should feel bound by it; but supposing for the present that there is no such decision, and that the question comes now to be considered for the first time, we should feel no difficulty as to the proper construction to be put upon these statutes. They were passed for the encouragement of learning and the arts, by ensuring to authors, artists, and inventors, the reward of their labours. In their language the acts are general; but *primâ facie* it must be intended that a British Legislature means only

1845.

CHAPPELL
v.
PURDAY.

1845.
 CHAPPELL
 v.
 PURDAY.

to protect British subjects, and to foster and encourage British industry and talent; and therefore, when statutes of the United Kingdom speak of authors and inventors, they mean authors and inventors, being subjects of and residents in the United Kingdom, or at least subjects by birth or residence, and do not apply to foreigners resident abroad: and, adverting principally to the statutes of the 8 Anne, and 54 Geo. 3, their provisions clearly refer to such works as are first published in Great Britain or the United Kingdom, from which first publication the time begins to run within which an entry is (under the 2nd section of the former statute, and under the 5th section of the latter) to be made at Stationers' Hall, in order to the recovery of penalties, and within twelve months after which publication copies are to be delivered by the publisher to the British Museum and other libraries. We should therefore conclude, upon the construction of the statutes alone, that a foreign author, or the assignee of a foreign author, whether a British subject or not, had no copyright in England, and no right of action on the ground of any piracy of his work committed in the British territories.

It remains to consider what have been the decisions of our Courts upon the construction of these and other similar acts of Parliament.

Under the stat. 21 Jac. 1, c. 3, against monopolies, the 6th section, which leaves as they stood at common law all the letters-patent, for fourteen years, of new manufactures granted to the first inventors, it has been decided that an *importer* is within the clause, and if the manufacture be new in the realm, he is an inventor, and may have a patent, though he is not the assignee of the foreign inventor, and though he may be a foreigner himself, if the Crown chooses to grant him a patent. The authority for this is to be found in *Edgeberry v. Stephens* (a). The principle of this decision is,

(a) 2 Salk. 447.

that the common law authorizes the part of a monopoly in this case, it being for the public benefit to introduce new inventions from abroad. Under the copyright acts there is, we believe, no decision precisely in point, but the result of the dicta and the authorities is, that a foreign author, or his assignee, may have the benefit of the statute, if his publication be in England, but otherwise not; and that the mere importer, without title, is not the author within the meaning of these acts.

The first case on the subject is *Clementi v. Walker* (a), which occurred in 1824 ; in which the opinion of the Court was strongly expressed in favour of what I have stated to be *prima facie* the construction of these acts. The points actually decided in that case were, first, that the plaintiff, who was not the author, nor then the assignee of the author, gained no right by a mere first publication in England ; and, secondly, that the assignee had no right here, if another had first published in this country. Whether, if the foreigner had first published in this country, he would have had the right under the statutes, or would have been deprived of it if he had first published abroad, are points undecided by that case ; but there is a strong opinion expressed, that if the foreign author does not publish here *promptly*, he loses any right he might otherwise have.

The next case on the subject was in 1828, of *Delandré v. Shaw* (b), before the Vice-Chancellor of England. It certainly does not decide the question now before us; but there is a dictum, that the Court does not protect the copyright of a foreigner, which is quite true, if there be nothing more than a foreign work, not published here on account of the author or his assignee. In 1831, there was the case of *Guichard v. Mori* (c), in which Lord Chancellor Brougham decided, that if a book were written by a foreigner, and published in a foreign country, the person

(a) 2 B. & C. 861. (b) 2 Sim. 237. (c) 9 Law J., Chanc., 227.
VOL. XIV. Y M. W.

1845.
CHAPPELL
v.
PURDAY.

1845.
 CHAPPELL
 v.
 PURDAY.

who purchased the right to publish it here could not support any claim to the copyright in this country, either at law or in equity. This case was followed by one on a similar subject, the copyright of an engraving, *Page v. Townsend* (a), in which the Vice-Chancellor of England expressed an opinion, that the object of the legislature, in the statutes as to engravings, was to protect those works which were designed, engraved, etched, or worked, in Great Britain, and not those which were designed, engraved, etched, or worked abroad, and only published in Great Britain. In 1839, another case came before the Vice-Chancellor of England, *Bentley v. Foster* (b), in which the learned Judge decided, that the stats. 8 Anne, and 54 Geo. 3, did not extend to a foreign author and his assignees, if he or they first published in England. There is an ambiguity in the judgment, as reported, for it may mean, if he is the first who published in England, or if the first publication anywhere be in England; and the context does not enable us to determine with certainty in which sense the words were used, though more probably the latter. An action was directed to be brought, but the defendants submitted, and no further investigation took place. In the meantime, in 1835, the case of *D'Almaine v. Boosey* (c) was decided by Lord Abinger. His Lordship granted an injunction to restrain the piracy of music composed by Auber at Paris, but not published there, and first published in England, not by the composer, but by his assignee, a native British subject. The decision puts the assignee on the footing of the author or composer, and holds him entitled to the copyright by virtue of such first publication, whether at common law or under the statutes.

These are the cases on the subject: and the result seems to be, that if a foreign author, not having published

(a) 5 Sim. 395.

(b) 10 Sim. 329.

(c) 1 Y. & C. 298.

abroad, first publishes in England, he may have the benefit of the statutes; but that no case has decided, that if the author first published abroad, he can afterwards have the benefit of it by first publishing here. The 7th section of the 4 Geo. 3, c. 107, favours this construction; for it protects against piracy, by importation from abroad, those works only which are first composed, written, printed, or published in "this kingdom;" probably it would include the whole of the United Kingdom; and this protection would seem to be co-extensive with the right to be thereby secured. A further argument may be derived, though perhaps not a very cogent one, from the International Copyright Act, 1 & 2 Vict. c. 89, which empowers her Majesty, by order in council, to give to the authors of works published abroad the sole power and liberty of printing in the British dominions, for a term not exceeding that which authors, being British subjects, were then by the law entitled to, in respect of books first published within the United Kingdom. This shews the opinion of the legislature, which may assist us in interpreting the law, and it shews that, by the former statutes, a foreigner, who first published abroad, was not entitled to the protection of the act, and probably was not entitled under any circumstances. Upon the whole, then, we think it doubtful whether a foreigner not resident here can have an English copyright at all; and we think he certainly cannot, if he has first published his work abroad before any publication in England.

It remains to be considered whether the plaintiff is in the situation of a foreigner who has first published abroad. At the time of the assignment to her, no publication had taken place; but before she published in England, a publication had taken place by the assignor in France; therefore the work had been published abroad before the plaintiff published it in England, and such publication was not by a wrongdoer, but by a person who was lawfully entitled to

1845.
 CHAPPELL
 v.
 PURDAY.

1845.
 CHAPPELL
 v.
 PURDAY.

publish. It seems to us, therefore, that for this purpose the plaintiff and Auber and Troupenas must be considered the same person; and we therefore think, that as the publication in Paris, by the composer or his assignee there, prevents a copyright from being acquired under the statutes, and there being no right at common law, or under the statutes, the rule for a nonsuit must be made absolute.

Rule absolute.

June 12.

YEARSLEY v. HEANE and HUDSON.

An action of trespass is not maintainable against the plaintiff in an action, or his attorney, for suing out an execution, and causing the defendant to be arrested under it, the defendant having at the time an order for protection from arrest under the Bankrupt Act, 5 & 6 Vict. c. 116, s. 4, of which the plaintiff had no notice.

TRESPASS for assault and false imprisonment.—Plea, first, not guilty, by both defendants, on which issue was joined; 2ndly, a plea by the defendant Heane, setting forth a judgment recovered by him as assignee of the estate and effects of R. G. Whatley, an insolvent debtor, against the now plaintiff, the issuing of a ca. sa. upon that judgment, directed to the sheriff of Gloucestershire, the delivery of it to the sheriff, with a direction to execute the same, by virtue of which the said sheriff arrested the now plaintiff, which was the trespass complained of.

There was also a plea by the defendant Hudson, setting up as a justification the issuing of the writ of ca. sa. by him as the lawful attorney of the said Robert Heane, the delivery of the writ to the sheriff by him as such attorney, to be executed in due form of law, and that he then requested the said sheriff to take and arrest the now plaintiff under the said writ, by virtue of which the said sheriff arrested the now plaintiff, which was the trespass complained of.

Replication to the second plea of the defendant Heane, that, before the statute made and passed in the session of Parliament held in the 7th & 8th years of the reign of

our lady the now Queen, intituled "An Act to amend the laws of insolvency, bankruptcy, and execution," and after the making and passing of the act of Parliament made and passed in the session of Parliament held in the 5th and 6th years of the reign of our lady the now Queen, intituled "An Act for the relief of Insolvent Debtors," and long before the said time when &c., and after the commencement of the said action in the said second plea mentioned, in which the said judgment was so recovered as in that plea mentioned, and before the commencement of this suit, to wit, on the 8th day of June, 1844, the plaintiff, being then indebted to the said Robert Heane, as assignee as aforesaid, for and in respect of the said debt by the said judgment so recovered as aforesaid, and also being indebted to divers other persons, and not then being and not having at any time been a trader within the meaning of the statutes in force relating to bankrupts at the time of the making and passing of the said act of Parliament of the 5th and 6th Vict., and having resided twelve calendar months next before the presenting of his petition as hereinafter mentioned, within the Bristol district of the Court of Bankruptcy, did give notice, according to the schedule to the said act of Parliament annexed, to the said Robert Heane, and divers other persons, being one-fourth in number and value of the creditors of the plaintiff, that he the plaintiff, then and for four months then last past residing at &c. &c. [setting out his different residences for the last five years], intended to present a petition to the Commissioner of the Bristol District Court of Bankruptcy, praying to be examined touching his debts, estate, and effects, and to be protected from all proceedings, upon making a full disclosure and surrender of such estate and effects for payment of his just and lawful debts, and that he time when the matter of the said petition should be heard was to be advertised in the London Gazette, and in the Cheltenham Journal Newspaper, one month at least

1845.
 YEARSLEY
 v.
 HEANE.

1845.
 YEARSLEY
 v.
 HEANE.

after the date of the said notice; and the plaintiff further says, that afterwards, and before the said time when &c., and before the passing of the said first-mentioned statute, to wit, on the 11th and 18th days of June in the year aforesaid, he caused the same notice to be inserted in the said London Gazette, and on the 10th and 17th days of June in the year aforesaid, in the said other newspaper, which was then circulating within the county wherein the plaintiff resided, to wit, in the said county of Gloucester. And the plaintiff further says, that afterwards, and after the commencement of the said action in the said second plea mentioned, and before the said time when &c., and before the passing of the said first-mentioned statute, to wit, on the 26th of July, 1844, the plaintiff did, under and by virtue of and according to the directions and provisions of the said act of Parliament made and passed in the 5th and 6th years of the reign of our said lady the Queen, duly present a petition, to wit, a petition as in and by that act is in that behalf mentioned, and containing therein the several particulars, and having annexed to it *a full and true schedule of his debts*, with other matters and things as in and by the said act is required, and according to the provisions and directions of the said act, for protection from process, to Richard Stevenson, Esq., then being a Commissioner of the Court of Bankruptcy of and in the said district; which said petition was forthwith afterwards, to wit, on the 26th day of July, 1844, aforesaid, duly filed of record in the said Court of Bankruptcy, &c. as by the said petition, &c., duly filed, &c., will more fully appear. And the plaintiff further says, that one month or least after the date of the said first-mentioned notice, and before the said time when &c., to wit, on the 16th July in the year aforesaid, the plaintiff did cause an advertisement to be inserted in the London Gazette, and the said other newspaper, that the matter of the said petition would be heard on the 5th day of August, 1844, at the

hour of eleven o'clock in the forenoon of that day, at the Bristol District Court of Bankruptcy, held at Bristol, in the said county. And the plaintiff further says, that afterwards, and before the said time when &c., and after the passing of the said first-mentioned statute, to wit, on the day and year last aforesaid, at the said Bristol District Court of Bankruptcy, held at Bristol aforesaid, in the county aforesaid, the said R. Stevenson, so being such commissioner as aforesaid, proceeded to and did examine upon oath the plaintiff, (the plaintiff having then duly appeared), and such of the creditors of the plaintiff as attended the said examination, and it did then appear to the said Richard Stevenson, so being such commissioner as aforesaid, that the allegations in the said petition, and the matters in the said schedule, were true, and that the debts of the plaintiff were not nor were any of them contracted by any manner of fraud or breach of trust, &c. &c., [negating the words in the 4th section of the stat. 5 & 6 Vict. c. 116]. And the said Richard Stevenson, so being such commissioner as aforesaid, being then and upon the said examination satisfied that the plaintiff had made a full discovery of his estate, effects, and credits, did then cause a notice to be given, that on the 27th day of August in the year aforesaid, he would proceed to make a final order, unless cause should then be shewn to the contrary, pursuant to the statutes in that case made and provided. And the plaintiff further says, that afterwards, and long before the said time when &c., and after the passing of the said first-mentioned statute, to wit, on the day and year last aforesaid, no cause being shewn why the said Richard Stevenson, so being such commissioner as aforesaid, should not make such final order as aforesaid, the said Richard Stevenson, so being such commissioner as aforesaid, and duly authorized and empowered in that behalf, did thereupon then, at the said Bristol District Court of Bankruptcy, held at Bristol aforesaid, in the county afore-

1845.
 YEARSLEY
 v.
 HEANE.

1845.
YEARSLEY
v.
HEANE.

said, duly make a final order, according to the said statutes, for the protection of the person of the plaintiff from all process, and for the final vesting of the plaintiff's estates and effects in Thomas B. Hutton, Esq., the official assignee then and there named by the said Richard Stevenson for that purpose, no creditor requiring to be chosen assignee; and the said order so made was a *final order for protection* and distribution, made under and by virtue of, and in strict accordance and compliance with, the provisions of the said acts of Parliament, in the matter of the said petition; as by the said order filed in the said district court, reference being thereunto had, will more fully and at large appear, and which said order still remains in full force. And the plaintiff further says, that the said debt so recovered by the said Robert Heane, as assignee as aforesaid, against the plaintiff as aforesaid, was named and mentioned in the said schedule to be due from the plaintiff to the said Robert Heane, as such assignee as aforesaid, and was due at the time of the filing of the plaintiff's said petition, and the said debt so recovered as aforesaid was not another or a different debt, and the said Robert Heane was named in the said schedule as one of the creditors of the said plaintiff for and in respect of the said debt. And the plaintiff further says, that the said judgment in the said second plea mentioned was obtained and recovered before the making of the said final order, and the said writ of *capias ad satisfaciendum* was issued out, and the said trespasses were committed, after the making of the said final order, and the said Robert Heane had notice of the said *several premises* before and at the time of the issuing of the said writ, and of the execution thereof; and the plaintiff further says, that by force and virtue of the said order, and the statutes in such case made and provided, the said plaintiff, at the said time when &c., was and is protected from the said writ of *capias ad satisfaciendum*.—Verification.

There was a similar replication, in substance, to the plea of the defendant Hudson, averring that he had notice of the premises.

Rejoinder, that he the said Robert Heane *had not*, before or at the time of the execution of the said writ of *ca. sa.*, notice that the said final order in the replication mentioned had been made as therein alleged.

There was a similar rejoinder to the replication to the plea of the defendant Hudson, and issue was joined upon both these rejoinders.

At the trial before *Pollock*, C.B., at the last Gloucester sittings, the learned judge was of opinion that there was no evidence against the defendant Heane on the first issue, the arrest having been made by order of the defendant Hudson (his attorney), Heane not being cognizant of it; and on that issue the jury found a verdict for the defendant Heane, but against the defendant Hudson. On the second issue, the plaintiff failed in proving that there was any notice *in fact* of the order for protection; but it was intended that the defendants were, by virtue of the statute, necessarily affected with notice. The learned judge, however, was of a different opinion, and the jury found a verdict for both the defendants on that issue.

Alexander, in Easter term last, obtained a rule to shew cause why the judgment should not be entered for the plaintiff on the second issue, notwithstanding the verdict found for the defendants. *Talfourd*, Serjt., also obtained leave to argue, on shewing cause against the above rule, for arrest of judgment on the first issue, on the ground that the action did not lie.

Talfourd, Serjt., now shewed cause. There are two questions in this case; first, whether trespass will lie for arresting the plaintiff under a *ca. sa.*, or whether that is not a *prima facie* answer to the action; secondly, if the action

1845.
YEARSLEY
v.
HEANE.

1845.
 YEARSLEY
 v.
 HEANE.

to make an order, unless cause be shewn to the contrary, which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process." And the recent stat. 7 & 8 Vict. c. 96, s. 29, enacts, "that if such petitioner shall be taken or detained under any process whatever, for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the commissioner to order any officer who shall have such petitioner so in custody to discharge such petitioner therefrom, without exacting any fee; and such officer shall be hereby indemnified for so doing." In a recent case of *Marsh v. Woolley* (a), where a person having an interim order for protection was arrested under a ca. sa., the Court of Common Pleas ordered him to be discharged out of custody, but refused to make the sheriff or the plaintiff pay the costs of the application. [Pollock, C. B.—I think it will be better first to discuss the point whether trespass is maintainable or not.]

Alexander and *Rickards*, in support of the rule, were then called upon.—Although there is no case which has decided that trespass is maintainable in such a case as the present, yet a strong argument may be drawn from the object of the act, to protect insolvents, that it should therefore be illegal to arrest them when they had an order for protection granted to them; and if the plaintiff was illegally arrested, he would have a right to maintain trespass. The preamble to the stat. 5 & 6 Vict. c. 116, recites, that "it is expedient to protect from all process against the persons such persons as have become indebted without any fraud or gross or culpable negligence;" and it enacts, by s. 4, that the final order shall be for the protection of the person of the petitioner from all process. It is no reason, because

(a) 1 Dowl. & L. 84.

he is discharged from custody, that he is not to have an action for having been arrested and detained in custody. The word "protection" involves all the incidental matters in which the petitioner is protected by the order, and one of them is his protection from arrest. [*Pollock, C. B.*—In *Lloyd v. Wood (a)*, which was an action on the case for attaching a person whilst he was privileged from attachment, *Patteson, J.*, doubted whether an action on the case would lie. *Alderson, B.*—What means has the defendant of knowing whether it is a true or a false claim of privilege that is set up?] Innocence of intention is no defence in trespass. [*Pollock, C. B.*—All that the legislature meant by his being "entitled to protection," is that the petitioner shall be entitled to be discharged if he is arrested. *Tarlton v. Fisher* clearly shews that to be the meaning of it. In cases of bankruptcy, it must have occurred very often that the bankrupt has been arrested when he was entitled to be discharged, and yet no action of trespass has ever been brought.] That case shews that there is no remedy by action against the sheriff; but *Ashurst, J.*, there says, "It is unnecessary here to go into the question what remedy there might be against the party." Unless this action be maintainable against the party suing out the execution, the plaintiff will have no remedy at all—it will be a wrong without a remedy. The validity of the protection cannot depend upon the question whether the party has a knowledge of it or not. [*Pollock, C. B.*—You wish to make us conclude that the legislature intended to grant a different protection by this act than they ever granted before; but there is nothing to warrant us in coming to such a conclusion.] The apparent object of the legislature will be defeated unless this action lies.

POLLOCK, C. B.—This is an application to enter judg-

(a) 5 Ad. & Ell. 228.

1845.
 YEARSLEY
 v.
 HEANE.

ment for the plaintiff notwithstanding the verdict. It is an action of trespass and false imprisonment. [His Lordship stated the pleadings.] The jury found that the defendant Heane was not guilty, for that he took no part whatever in the actual arrest. The case remains as against Hudson, who justifies not as the party, but as his attorney, and the case against him is that of an attorney, who, finding a judgment in a cause in favour of his client, sues out an execution, which apparently he had a right to do, but not being a party to the proceedings before the Insolvent Debtors' Court. I own I should have paused long before I decided that the act of Parliament, as contended for, would be notice of the proceedings to all the world, not only to the persons who were parties to the proceeding by being creditors, and therefore necessarily must have some notice, but also to a person in the situation of the defendant Hudson, who was an attorney who came in afterwards, and was not the attorney of the other defendant at the time of the proceedings in the Insolvent Court. The attorney, Hudson, justifies under a plea alleging that his client Heane recovered a judgment, and that he, as his attorney, as undoubtedly he lawfully might, upon that judgment sued out a writ of *capias ad satisfaciendum*; and there is nothing upon the record to shew that Hudson was a party to the suit, so as to induce us to hold there was any notice in fact, if we thought notice were necessary. The question, whether the proceedings before the Insolvent Debtors' Court, or upon the hearing of the petition, are proceedings of which the whole world was bound to take notice, has not been fully argued, and therefore I say nothing about it. The question that has been argued is this, whether a person is to be considered liable to an action of trespass for taking out a writ of *capias ad satisfaciendum* against a person who had an order for *protection* under the statute 5 & 6 Vict. c. 116. The application to enter judgment for the plaintiff, notwithstanding the verdict obtained

the defendant Heane, certainly proceeds upon the ground that the proceedings themselves were notice by virtue of the statute, and that therefore, notwithstanding the jury have found that there was no notice in point of fact, the party is bound by the proceedings without any actual notice; but a previous question arises, whether the replication, which admits the fact of the *capias ad satisfaciendum* having issued upon a judgment, is a good replication. I am of opinion that it is not, and it appears to me that the point has been substantially decided in the case referred to, of *Tarlton v. Fisher*, and in the other cases which have been cited. It is quite unnecessary to consider the distinction that may be taken between the case of the privilege of the Crown and its servants, the case of foreign ambassadors and their servants, the protection afforded to peers of the House of Lords, which is perpetual, and the protection of members and servants of the House of Commons, which lasts only a certain time—from the time of the meeting of the House to the time of its prorogation. In the case of a bankrupt, having what is called an order for protection, it is sufficient to say that in no one of the Courts can a case be found where a plaintiff, who had obtained such protection, has been held entitled to maintain an action of trespass under circumstances like the present, where a writ has been sued out against him upon a judgment regularly obtained. In the case of *Tarlton v. Fisher*, there is a very plain and distinct intimation that such an action cannot be maintained; and in *Lloyd v. Wood* (a), where the action was brought, not in trespass, but in case, and the Court held that that action was not maintainable, unless the proceeding and the nature of it was distinctly set out, and that it was not sufficient to aver that the party was protected from arrest upon the argument,—in delivering the judgment of the Court, some

1845.
 YEARSLEY
 v.
 HEANE.

(a) 5 B. & Ald. 328.

1845.
 YEAZLEY
 v.
 HEANE.

of the judges make a considerable question whether the action could be maintained at all. Nobody appears to have suggested that an action of trespass could be maintained; on the contrary, from the general course of the argument, and what was said by the judges, it seems to have been the clear opinion of the Court that it could not; and undoubtedly such has been the uniform impression throughout Westminster Hall, I should say for above thirty years; I can say that upon my own personal experience. It appears to me, therefore, that the writ of *capias ad satisfaciendum* is in itself *primâ facie* an answer to this action, and that the replication is bad. The protection is limited to the fact of the individual so arrested being entitled to be discharged. It is said this is a great hardship, and that here is a wrong without a remedy; but there are plenty of instances of that. In reality the question comes to this, what did the legislature mean in giving this protection? Did it mean to give more than this, that if the party was arrested he might be discharged,—whereby he has the full benefit of the protection,—or did the legislature mean to confer upon him a benefit beyond that, and to give him a right to claim damages? I think not, and that we shall best carry out the intention of the legislature if we discharge this rule.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

ORDER OF THE JUDGES.

12th June, 1845.

" We have considered the means best calculated to prevent parties from fraudulently obtaining Judges' orders for signing judgment, and recommend that the following precautions be adopted:—

" That all written consents, upon which such orders are obtained, shall be preserved in the chambers of the respective Courts.

" That in actions where the defendant has appeared by attorney, no such order be made, unless the consent of the defendant be given by his attorney or agent.

" That where the defendant has not appeared, or has appeared in person, no such order be made, unless the defendant attends the Judge and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf; but we think that these precautions are unnecessary where the defendant is a barrister, conveyancer, special pleader, or attorney.

" We think that Sunday ought to be counted as one of the four days between the delivery of paper books and the day of argument; except it is the last, when it is to be omitted, according to the general rule."

END OF TRINITY TERM.

1845.

VACATION SITTINGS AFTER TRINITY TERM.

June 18.

HARMER v. JOHNSON.

In August 1841, the defendant executed to the plaintiff a warrant of attorney, with a defeasance. Judgment was signed thereon on the 13th Sept. 1841, but the roll was never carried in. By a judge's order, obtained by consent on the 9th Sept. 1842, it was ordered that execution should issue on the judgment without a sci. fa. On the 14th Sept., a fi. fa. was issued, which was returned nulla bona on the 29th, and filed on the 20th December, 1842. In April 1845, an alias fi. fa. was issued, under

J. HENDERSON had obtained a rule, calling upon the plaintiff to shew cause why the writs of fieri facias and alias fieri facias, issued in this cause, should not be set aside. It appeared from the affidavit in support of the rule, that the defendant executed to the plaintiff a warrant of attorney, dated 30th August, 1841, subject to a defeasance, which stated only the time at which the money secured thereby was to be repaid; and judgment was signed thereon on the 13th of September, 1841, but the roll was never carried in. On the 14th of September, 1842, a writ of fieri facias was issued, which, with the sheriff's return thereon of nulla bona, dated the 29th September, was filed on the 20th of December, 1842. No scire facias was ever issued. On the 25th of April, 1845, an alias fieri facias was issued, under which the defendant's goods were taken in execution. On the 26th of April, 1845, a fiat in bankruptcy issued against the defendant, and assignees were subsequently appointed, on whose behalf the present rule was obtained. The affidavit in opposition to the rule disclosed the fact, that, by a judge's order, obtained by consent, and dated 9th Sep-

which the defendant's goods were taken. He afterwards became bankrupt:—*Held*, first, that the judge's order was not void as against the assignees, under 3 Geo. 4, c. 39.

Secondly, that the alias fi. fa. was regular; for that, since the stats. 2 W. 4, c. 39, and 3 & 4 W. 4, c. 67, succeeding writs of execution need not be tested on the return day of the preceding writ, and may be sued out at any time afterwards, without the necessity of entering continuances on the roll.

mber, 1842, it was ordered that execution should issue on the judgment, without a scire facias to revive the me.

In Trinity Term (June 10), before *Parke*, B., sitting one,

1845.
HARMER
v.
JOHNSON.

Martin shewed cause against the above rule.—These writs are perfectly regular. The law on this subject is fully stated in *Simpson v. Heath* (a); and the doctrine there laid down is, that a defendant may be taken in execution after the expiration of a year from the judgment on a ca.

returned out within the year, though not returned and laid down within the year; and that no scire facias is necessary in such case. If this be so, how can the circumstance of a writ being legally issued after the expiration of the year, in pursuance of an order to which the defendant is a consenting party, make the case worse? [*Parke*,

—It is just the same as if you had revived the judgment by scire facias, and then issued the fieri facias. Then, under a new process, the writ does not require continuances.]

But it will be said the judge's order is void, as being against the policy of the stat. 3 Geo. 4, c. 39, ss. 3 and 4, which make warrants of attorney void against assignees, unless registered, and provide, that those upon which no release or condition shall have been indorsed, shall be void to all intents and purposes. But the answer is, that the instrument is only voidable by writ of error and consuetudo tollit errorem.—The Court then called on

J. Henderson, contra.—First, this order is void, as being against the policy of the stat. 3 Geo. 4, c. 39. If such a contrivance be allowed, the object of the statute will be altogether defeated, and other terms introduced, by way of release of a warrant of attorney, than those which the statute requires. This is a mere consent of parties, in the

(a) 5 M. & W. 631.

1845.
 {
 HARMER
 v.
 JOHNSON.

shape of a judge's order. Now, could they have agreed verbally to introduce into the defeasance terms inconsistent with the requisitions of the statute? [*Parke, B.*— You say they are now, by agreement, altering the terms of the defeasance, which ought to be in the warrant of attorney, and filed, so that all parties may see them. Yes. The order, therefore, being in contravention of the statute, is, at all events as against the assignees, absolutely void.

Secondly, the alias fieri facias was irregular. Upon a judgment above a year old, the only remedy is by action of debt on the judgment, or by scire facias, except in certain cases, one of which now certainly is, where it is dispensed with by consent. Here the consent was given in September, 1842, to the issuing of execution then; and it cannot avail now that the rights of third parties have intervened. That execution, so consented to, was issued, and returned nulla bona at that time; and there the operation of the consent, which was limited to that execution, ended. *Simpson v. Heath* has no application to the present case. That case only decided that a writ of execution, issued within the year, need not be returned within the year; as was held also in *Greenshields v. Harris (a)*. No doubt the form of continuances is not now necessary, but the present objection is not pointed to that. In *Bellasis v. Hanford (b)*, it was held, that the defendant, by bringing a writ of error after the expiration of a year after the judgment, had thereby "renewed the record," so as to dispense with the necessity of a sci. fa. in order to have execution on the judgment. But still a scire facias would be necessary after twelve months from the date of the last record. The act of the defendant only postpones the commencement of the year. The new law has only obviated the necessity of the form of continuances; and if too long an interval be interposed, the old law still applies. If the last writ be

(a) 9 M. & W. 770.

(b) Cro. Jac. 384.

not duly connected with the former, it must stand alone ; and if it stands alone, it comes within the rule which renders a scire facias necessary after the lapse of twelve months. Here it was not only issued without the *fact* of continuances having been entered, but without the *possibility* of continuances. If the Court could supply the intermediate writs and returns, this writ would require an amendment from an alias into a pluries, and the Court would not allow that to be done, where the rights of assignees have intervened.

1845.
HARMER
v.
JOHNSON.

Cur. adv. vult.

PARKE, B., now delivered his judgment.—In this case Mr. *Henderson* obtained a rule nisi to set aside an execution on a judgment on a warrant of attorney, with a defeasance. The judgment was signed on the 3rd of September, 1841, and, after the expiration of a year, a judge's order, by consent, was obtained to issue execution on the judgment, without a sci. fa. A fi. fa. was accordingly issued, in the new form, returnable on execution, on the 14th day of September, 1842, and was returned nulla bona on the 29th of December, 1842 ; and on April 23, 1845, an alias fi. fa. was issued, under which a levy had taken place. The defendant became bankrupt, and the application to set aside the execution was made by his assignees.

The principal ground on which the application was originally made was, that the first execution issued without a sci. fa. to revive the judgment ; but that objection appearing to have been removed by the judge's order, Mr. *Henderson* relied upon two others.

The first was, that the judge's order, by consent, though valid between the parties, was void as against the assignees, as being against the policy of the law. The 3 Geo. 4, c. 39, makes warrants of attorney void against assignees, unless registered ; and expressly enacts, that

1845.
HARMER
v.
JOHNSON.

those upon which the defeasance or condition has not been indorsed shall be void to all intents and purposes. This provision the Court of King's Bench, in *Bennett v. Daniel* (a), held, had the effect of avoiding such warrant of attorney as to assignees only; and Mr. *Henderson* argued that this stipulation, that no sci. fa. should be necessary, not being part of the defeasance indorsed on the warrant of attorney, was altogether void as against his clients. This objection I am of opinion ought not to prevail, because the agreement to waive the necessity of a sci. fa. was in fact no part of the defeasance or condition, even supposing that term to embrace all the contemporary stipulations; for it was made at a subsequent time, and, indeed, was nothing more than a waiver of the suing out a sci. fa., which the plaintiff was about to do, in order to warrant an execution on his judgment, and was consented to for the purpose of saving expense.

The next objection was, that the alias fi. fa. was irregular, because it was not properly connected with the first fi. fa.; nor could any continuances be entered on the roll to cure the defect, because, if continuances were entered, it would be necessary to amend the alias by converting it into a pluries; and such an amendment, though it would be allowed as against the original defendant, could not be permitted as against his assignees.

This objection is founded on the supposition that process in the new form must be continued in a similar manner to that in the old form; and it seems to me that this is unnecessary.

In the old form, each subsequent writ of mesne process was tested on the return day, or the quarto die post, where the proceedings were by original; and in cases of final process, on the return day of the preceding writ. The writ might be sued out, tested of a prior date, and there was

(a) 10 B. & C. 500.

never any difficulty in connecting one writ with another, by an entry of *vicecomes non misit breve* on the return day of the prior writ. But in the new process, the writs must be tested, or bear date (*a*), on the day they are sued out, and writs of *capias ad respondendum* are returnable on execution, but have a return day contingently at the end of four months; those of *ca. sa.* have no fixed return day; they are returnable on execution only, and if not executed, are not properly returnable at all; the judge's order, in cases of writs of execution, being rather a mode of obliging the sheriff to notify to the Court what has been done under the writ, than creating a new fixed return day for the writ, instead of the former one, expressed in the body of the writ itself (*b*). The old mode of continuing, by entering on the record a fictitious writ, with a teste of the return day of the former writ, cannot now be adopted with respect to this description of writ; for there is no such a return day: and if a judge's order had the effect of making a return day for the writ, or the writ, when returned in obedience to it, would be spent and determined, (as I have no doubt it would), so that a new writ might issue founded on the return, I do not think the Court would sanction the entry on the record of a fictitious judge's order to return a writ, in order to make proper continuances; and if one writ was actually returned by virtue of a judge's order, another writ, which must be tested on the very day it issues, could not be a proper writ in continuation, unless it actually issued on the very day of the former return; a course so inconvenient that it could very rarely be adopted; and, practically, there would be no available mode of continuing such a writ on the old principle; which, though a fiction, made the record consistent, and excluded any presumption of the satisfaction of the debt, arising from intermediate delay.

1845.
HARMER
v.
JOHNSON.

a) 2 Will. 4, c. 39, s. 12.

b) *Kemp v. Hyslop*, 2 M. & W. 63.

1845.
 HAMMER
 v.
 JOHNSON.

What, then, is to be done, where a writ of execution is issued within the year after the judgment or its revival, and the plaintiff wishes to avoid the necessity of a sci. fa.? Must the plaintiff issue process in the old form, with fixed return days, which he has the option of doing, for the stat. 3 & 4 Will. 4, c. 67, is not obligatory; or may he adopt the new form, without any continuance?

If the legislature did not intend that the process in the new form should be connected together in any way, then it would follow that, if the plaintiff meant to avoid the necessity of a sci. fa., he must adopt the old form of process and the old form of continuance; or, if the legislature intended that the new process should be connected by the issuing one writ on the precise day that the other was returned, that course must be adopted. It is highly probable, that all the consequences of the changes introduced by the statutes 2 Will. 4, c. 39, and 3 & 4 Will. 4, c. 67, were not foreseen. But I think that the legislature must be taken to have intended, that process in the new form should be connected; and that the only mark of connexion should be, the description of one writ being an alias or pluries writ.

Now, with respect to mesne process, it is clear that the intention of the legislature was, that the writs should be connected; for it is so expressly provided by 2 Will. 4, c. 39, s. 10, that every writ of summons and capias may be continued by an alias and pluries. It is unnecessary that one writ of mesne process, in continuation of another, should be issued on the very return day of a former writ; for when the operation of any statute of limitations is to be defeated (where the object is not to favour the connexion of one writ with another), it may be sued out within a month. It would seem, then, that the writs might be sued out at a greater interval in ordinary cases, and it has been so held with respect to a capias *ad respondendum*, even where it was issued beyond the

period of four months, during which the first writ operates; *Holson v. Leman* (a); nor need the first writ be returned; *Gregory v. Desanges* (b). What, then, is to be the interval during which a writ may be issued in continuation of another in mesne process? There appears to be none but the limitation of twelve months, after which the cause is out of court. And as the subsequent statute for the amendment of the former, 3 & 4 Will. 4, c. 67, enables a plaintiff to sue out writs of execution in the new form, I think it must be intended that such writs should have similar properties with writs of mesne process, and consequently that succeeding writs need not be tested on the day of the return of the preceding writs, nor within any particular time afterwards; for the limitation of twelve months does not apply after judgment. Nor will any practical inconvenience to the defendant follow; for a writ of execution may now be sued out with a long interval between the teste and return, the rule as to the process being returnable in the following term not being applicable to final process: nor, if the writ be continued on the record, does the defendant derive any real advantage. If the amount of the judgment has really been paid before the alias or pluries writ has issued, the defendant would be released on motion, or *auditâ querelâ*. For these reasons, I think the execution regular; and that this rule must be discharged, but without costs.

Rule discharged, without costs.

(a) 2 Dowl. P. C. 296.

(b) 5 Dowl. P. C. 193.

1845.
HARMER
v.
JOHNSON.

1845.

June 18.

CHOLMELEY, Bart., and Another v. DARLEY.

A., B., and C. made a joint and several promissory note for £100, payable to the plaintiffs, trustees of a banking company, or their order, on demand. A memorandum, indorsed on the note at the same time, signed by A., B., and C., stated that the note was given to secure floating advances made by the company to A., from the respective times when such advances had been or might be made, together with commission, &c., not exceeding in the whole, at any one time, the sum of £100. In an action by the payees of the note against C., to which he pleaded the Statute of Limitations, the plaintiffs proved payments by A., in reduction of the floating balance, within six years, and sought to use the memorandum indorsed on the note to shew that such payments had reference to the note:—*Held*, that it could not be read in evidence without an agreement stamp.

ASSUMPSIT on a promissory note for £100, dated 1st July, 1836, made by the defendant, payable to the plaintiffs, or their order, on demand, with lawful interest.—Pleas, first, that the defendant did not make the note; second, the Statute of Limitations: on which issue was joined. At the trial, before *Parke*, B., at the last assizes at Norwich, the note was produced, and was in the following form:—

“Market Rasen, July 1, 1836.

“Borrowed and received of the Lincoln and Lindsey Banking Company the sum of £100, which we jointly and severally promise to pay to Sir Montague Cholmeley, Bart., and William Wriglesworth (trustees of the said Banking Company), or their order, on demand, with lawful interest for the same.

“THOMAS SMITH, sen.

“THOMAS SMITH, jun.

“THOMAS DARLEY.”

On the back of the note the following memorandum was indorsed:—

“The within note is given for securing floating advances from the Lincoln and Lindsey Banking Company to the within-named Thomas Smith, sen., with lawful interest for the same, from the respective times when such advances have been or may be made, together with commission, stamps, postages, &c., and all usual charges and disbursements, not exceeding in the whole, at any one time, the sum of £100 within mentioned.

“THOMAS SMITH, sen.

“THOMAS SMITH, jun.

“THOMAS DARLEY.”

Held, that it could not be read in evidence without an agreement stamp.

[It was proved that the note and indorsement were taken at the same time, and before any of the signatures were affixed to them. Payments were shewn to have been made by Thomas Smith, sen., in reduction of the balance on the banking account, within six years before the commencement of this action. It was objected, for the defendant, that the whole instrument taken together amounted, not to a promissory note, but to a special agreement, and ought to have been stamped accordingly, and treated upon as such; and therefore that the plaintiff must be nonsuited. The learned Judge declined to nonsuit, and under his direction a verdict passed for the plaintiffs, the being reserved to the defendant to move to enter a demurrer or a verdict for him. In last Easter Term, a *venue nisi* was obtained for that purpose; against which

1845.
 CHOLMELEY
 v.
 DABNEY.

Byles, Serjt., and *Gunning* now shewed cause.—This instrument was rightly received, and supported the declaration. The note, and the indorsement upon it, together make but one instrument, and amount to a promissory note. The indorsement is, in truth, nothing more than an amplification and explanation of the words “value received.” There is no doubt that a floating balance on a banking account may constitute a good consideration for a promissory note or a bond: *Pease v. Hirst* (a). And there is nothing in the memorandum indorsed to make the note payable on a contingency. *Leeds v. Lancashire* (b) will probably be relied on for the defendants. There the note, which was, as here, in the common form of a joint and several note, signed by three persons, was indorsed with a memorandum made at the time of its signature, which stated, that it was taken as a security for all the balances to the amount of the sum within specified, which one of the parties might happen to owe to the payee; that it should be

(a) 10 B. & C. 122.

(b) 2 Campb. 205.

1845.
 CHOLMELEY
 v.
 DARLEY.

in force for six months, and that no money should be liable to be called for sooner in any case. There Lord *Ellenborough* ruled, that the payee could not declare upon this instrument, against one of the sureties, as a promissory note, for that between those parties it was an agreement and must be stamped and declared on as such. But the case is distinguishable, on the ground that the indorsed memorandum there introduced a condition or contingency into the contract. Here it is merely descriptive of the consideration. *Brill v. Crick* (a) is in point. There the note had an indorsement, stating that it was given on the conditions mentioned in the memorandum of agreement annexed, (which was an agreement to postpone the trial of a cause on the defendant's undertaking to give the plaintiff a promissory note, by way of security, in case the plaintiff should recover a verdict, but to be given up in case he should fail in the action): and the Court held, that this was an agreement collateral to the note, not intended to alter its legal effect, but made only for the purpose of *ear-marking* it, and to shew that it was the note referred to in the agreement.

Whitehurst (with whom was *O'Malley*), *contra*.—This instrument, taken altogether, is clearly not a promissory note, but an agreement, and ought to have been stamped and declared upon as such. This is not, as it pretends to be, a promissory note *for value received*, but is in the nature of a guarantee by the defendant to repay the plaintiffs so much money as they may thereafter advance to Thomas Smith, sen., not exceeding £100. If nothing had been proved to be due from him, nothing would have been payable upon this instrument. In the case of *Brill v. Crick*, the Court adopted the distinction taken in *Stone v. Metcalfe* (b), that if an indorsement of this kind be co-

(a) 1 M. & W. 232.

(b) 4 Campb. 217.

temporaneous with the note itself, it is part of the agreement between the parties. [*Alderson*, B.—If this note were indorsed over, what would the indorsee recover?] That is wholly uncertain: he would recover according to the state of the banking account. *Hartley v. Wilkinson* (a) was a stronger case than the present; and *Leeds v. Lancashire* is also precisely in point. [*Parke*, B.—Suppose the indorsement be not part of the note, but an independent agreement; it is nevertheless a material part of the plaintiffs' case, in order to enable them to ascribe the payments to the note, so as to defeat the plea of the Statute of Limitations. The case cannot be taken out of the statute, except by part payment of principal or interest on the note. For that purpose the plaintiffs must connect the floating balance with the note, to shew that it was intended to be a security for the floating balance. Then, for that purpose, this is an agreement the matter of which is above the value of £20; because it refers to a note of the value of £100: it ought, therefore, to have borne an agreement stamp. *Alderson*, B.—My Brother *Byles* says it is only an amplification of the "value received;" still it is an agreed amplification of it.]—The learned counsel was then stopped by the Court, who made the

1845.
CHOLMELEY
v.
DARLEY.

Rule absolute to enter a nonsuit.

(a) 4 Campb. 127.

1845.

June 18.

Seemle, that an agreement by a lessee for the transfer of his interest in the term, (not exceeding three years), which, not being in writing, is invalid as an assignment by the Statute of Frauds, cannot operate as an under-lease.

BARRETT v. ROLPH and Another.

TRESPASS for breaking and entering certain closes of the plaintiff, situate at Woodham Walton, in the county of Essex.—Pleas, 1st, not guilty; 2ndly, that the said closes were not the closes of the plaintiff; with others which is unnecessary to refer to. At the trial, before Alderson B., at the last assizes for Essex, the facts appeared to be as follows:—

James Barrett, the late husband of the plaintiff, had been tenant of the premises in question under a farming lease for years, which expired at Michaelmas, 1844. He died on the 29th of June, 1843, and the plaintiff, his widow, continued in possession of the farm. By his will, his brother, Cornelius Barrett, was appointed his executor. A negotiation ensued between Cornelius Barrett and the plaintiff, for the purpose of securing to her the possession of the farm for the remainder of the term. The witnesses for the plaintiff stated, that, on the 30th of September, 1843, it was verbally agreed between the plaintiff and the executor that the plaintiff should remain in possession until the expiration of the lease, she paying the rent reserved by the lease. The evidence for the defendant went to shew, that this agreement was conditional on the plaintiff's paying the sum of £77, the amount of a valuation of the stock, by the 3rd of October following; shortly after which day, no payment having been then made, the defendants, by the direction of Cornelius Barrett, (under whom, as landlord, they justified in one of the pleas), entered for the purpose of taking possession of the farm. The learned Judge left it to the jury to say, whether the agreement of the 30th of September was an absolute or conditional one; and they found a verdict for the plaintiff.—Damages, £100.

the following Easter Term, *Montagu Chambers* obtained a rule nisi for a new trial, on the ground (which was not mentioned at the trial) that the agreement, whether it were absolute or conditional, was void by the operation of the 3rd section of the Statute of Frauds, 29 Car. 2, because it was not in writing; and that it did not fall in the 2nd section, inasmuch as the intention of the parties was not to create an under-lease, but to assign the residue of the term. He referred to the following authorities: *Botting v. Martin* (a), *Mollett v. Brayne* (b), *Wans v. Cook* (c), *Graham v. Whichelo* (d), and *Lyon v. Hannell* (e).

1845.
BARRETT
v.
ROLPH.

Hannell, Serjt., (*E. James* with him), now shewed cause. His rule was obtained on the ground of a supposed misdirection on the part of the learned Judge, in not ruling, even if the agreement were proved to be such as the plaintiff contended it was, a note in writing of that agreement was necessary in order to satisfy the 3rd section of the Statute of Frauds. But no such point was made at trial; the only question there was, whether the agreement was an absolute or a conditional one? [*Parke*, B.—Yes, according to *Poultney v. Holmes* (f), the agreement, to make it good, would be construed as creating an under-lease.] The plaintiff alleged that there was a demise by *Helius Barrett* to her. The defendant, at the trial, did deny that; but said it was a *conditional* demise. It never suggested that it was an assignment. If the defendant had made that point, the question might have been left to the jury, whether it was a contract to let or to assign. For certain purposes the agreement may operate as an assignment—as to prevent the right of distress, by giving the executor of the reversion: it may also operate

(a) 1 Campb. 317.

(d) 1 C. & M. 188.

(b) 2 Campb. 103.

(e) 13 M. & W. 285.

(c) 2 B. & Ald. 119.

(f) 1 Stra. 405.

1845.
 BARRETT
 v.
 ROLFE.

rate, according to the contract of the parties, to create the relation of landlord and tenant. [*Alderson, B.*—There was abundant evidence that might have gone to the jury to shew that it was an agreement to let; but both parties went to the jury on the ground that it was a letting. *Parke, B.*—If this objection had been made, it might have been cured by evidence shewing that it was a good lease between the parties.]

Willes (*Chambers* with him), in support of the rule.—Whether this was a demise or an assignment is a question of law, and not of fact for the decision of the jury. [*Parke, B.*—But the argument is, that evidence might have been supplied to shew that in fact there was a letting.] The result of the evidence clearly was, that the plaintiff was to take the executor's interest in the farm, and remain there until the expiration of the term. If the agreement did not amount to that, it was a mere license, countermandable and countermanded. The only question is, whether Cornelius Barrett had a right to the possession, as against the plaintiff, at the time of the commission of the trespasses; and that depends on whether that which passed on the 30th of September, 1843, was a valid conveyance of any interest to the plaintiff. Now, what was the interest which purported to be conveyed thereby? Clearly the residue of the term; and the conveyance was therefore an assignment. The plaintiff was to pay the rent to the landlady. [*Parke, B.*—If you had taken this objection, the plaintiff might have called a witness to shew that the rent was to be payable to Cornelius Barrett, though in form she was to pay it directly into the hands of the landlady; and, according to *Poultney v. Holmes*, that would be sufficient to create a lease. That case was questioned, but was supported by *Buller, J.*, in *Palmer v. Edwards* (a), on

(a) Dougl. 187, n.

the ground that, though the agreement amounted to an assignment, yet, as it could not operate as such for want of a note in writing, it should be good as an under-lease as against the party granting it. If, under any circumstances, the defect could have been supplied by evidence, in case you had made the objection, there ought not to be a new trial. Here non constat but that the defect might have been supplied. If, on the other hand, it be a matter which cannot be cured by evidence, the Judge is bound to find it out, and to direct a nonsuit; but not where the objection might be removed by evidence, if it were taken by counsel.] Even supposing the point to have suggested itself to counsel at the trial, it is a point of law apparent on the facts proved, which shewed that this was an assignment. The case of *Poultney v. Holmes* must rest upon the *second* section of the Statute of Frauds, if at all. Now that section excepts from the operation of the act "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two third parts at least of the full improved value of the thing demised." So that to bring a case within that exception, there must be a landlord, a tenant, and a rent reserved; which cannot be unless there is a *reversion*. The only sound distinction is between a case of *landlord and tenant*, and a case of *assignor and assignee*; and where the statute speaks of a landlord and a tenant, and of a rent reserved, that necessarily means, according to the system of landlord and tenant law in this country, a case where there is a *reversion*, to which the rent is incident. [*Parke, B.*—That is, you dispute that *Poultney v. Holmes* is good law.] The explanation given of it by *Buller, J.*, appears to be unsatisfactory; and it has been questioned by conveyancers: see 4 Jarman's Conveyancing, 518. And upon the stat. 11 Geo. 2, c. 19, the House of Lords has held that the terms landlord and tenant are only used with reference to

1845.
 BARRETT
 v.
 ROLPH.

1845.
 BARRETT
 v.
 ROLPH.

cases where there is a *reversion* : *Pluck v. Digges* (a). *Poultney v. Holmes* was only a *nisi prius* decision, and is very loosely reported ; and Mr. Jarman considers it as overruled by *Parmenter v. Webber* (b). [Parke, B.—It certainly cannot be supported on the ground of the reservation of rent. And it is equally unsustainable on the ground upon which it was rested by Buller, J. The intention of the parties must be deduced from their words, and cannot be differently construed before and after the passing of an act of Parliament. That which would have been an assignment before the Statute of Frauds must equally be so since.

PARKE, B.—The parties had better agree to settle the matter, by reducing the verdict to an amount which will carry costs, instead of going down to a new trial, and raising this question by bill of exceptions. The case of *Poultney v. Holmes* is certainly of very doubtful authority. If this objection could be cured, there ought not to be a new trial ; and it might be cured if *Poultney v. Holmes* be good law ; but it is very questionable whether that case be good law, especially since the decision of the Court of Common Pleas in *Parmenter v. Webber*. It is very difficult to say that, because an agreement is by parol, and therefore cannot operate as an assignment, it is to be construed to give a less interest than the parties intended. I think the doctrine cannot be sustained, and therefore that, if the plaintiff went down to a new trial, there would be a verdict against her.

The parties thereupon agreed that the rule should be discharged, the damages being reduced to 40*s*.

Rule discharged accordingly.

(a) 5 Bligh, N. S., 31.

(b) 8 Taunt. 593.

1845.

THOMAS v. HUDSON.

June 28.

CASE against the keeper of the Queen's Prison for an escape. The declaration set forth the recovery of a judgment in this court by the plaintiff against one Thomas Foulkes, in an action of trespass for an assault, battery, and false imprisonment, for 150*l.* 3*s.* 7*d.* damages and costs, and alleged that the plaintiff sued out a *fi. fa.*, under which the sheriff levied only 5*l.* 5*s.*, which he paid to the plaintiff in part satisfaction of the said damages, the said T. Foulkes having no more goods, &c., on which he could levy. That he afterwards sued out a *ca. sa.* for the residue of his damages and costs, under which *ca. sa.* the said T. Foulkes was taken by the Sheriff of Middlesex, and having been afterwards, on the 8th of July, 1844, brought up by *habeas corpus*, was regularly committed by Gurney, B., to the Queen's Prison, in execution, for the residue of the sum of 150*l.* 3*s.* 7*d.* The declaration then averred, that the defendant, being keeper of the said prison, received the said T. Foulkes, and had him in custody on the said commitment, until he the defendant, not regarding the duty of his office as such keeper as aforesaid, afterwards, to wit, on &c., freely and voluntarily suffered and permitted the said T. Foulkes to escape and go at large.

The defendant pleaded, that, after the said T. Foulkes was committed to the custody of the said defendant, and whilst he remained in such custody, and after the making and passing of the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, to wit, on &c., the said T. Foulkes presented a petition to the Court of Bankruptcy, praying relief under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, with a schedule

The plaintiff having obtained judgment against one F. in an action of assault and false imprisonment, sued out a *ca. sa.* whereon F. was taken and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape — *Held*, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected,

being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction.

Seemle, that, the judgment debt being in tort, and not in an action for the recovery of a debt, the commissioner had no power to order the prisoner to be discharged out of custody under the above acts of Parliament.

1845.
 THOMAS
 v.
 HUDSON.

of his debts annexed to his petition, such schedule including the sum due to the plaintiff; that at the time of presenting the said petition, the said T. Foulkes was not nor ever had been a trader, and that he was at the time a prisoner in execution on a judgment obtained by one Richard Croft, for a debt of £1200; that, after the said petition was presented, one Joshua Evans, then being one of the commissioners of the Court of Bankruptcy, and the commissioner to whom the matter of the petition was referred, gave the petitioner an interim order of protection until the 18th of November then next, and afterwards, and whilst the said interim order was in full force, and whilst the said T. Foulkes was in the defendant's custody, namely, on the 1st of October, 1844, made an order on the said defendant to discharge the said T. Foulkes out of custody as to the execution at the suit of plaintiff; whereupon the defendant, acting in obedience to the said order, discharged the said T. Foulkes out of his custody as to the said execution, as he lawfully might for the cause aforesaid; *quæ est eadem*, &c. The plea then averred, that the defendant had no notice of the nature or causes of the plaintiff's action, save what appeared by the writ of habeas corpus cum causa, and the return thereto, as in the declaration mentioned, and as the same were thereafter set forth, by which latter document, which was set out at the end of the plea, the sheriff stated that he had the said T. Foulkes in custody under a writ of ca. sa., to satisfy the plaintiff a sum of 146*l.* 6*s.*, residue of 150*l.* 3*s.* 7*d.*, the damages in the said writ mentioned.

General demurrer, and joinder.

The points marked for argument on the part of the plaintiff were as follows:—First, that the action, “Thomas v. Foulkes,” in the declaration mentioned, not being an action for the recovery of any debt, but an action of trespass for assault, battery, and false imprisonment, Mr. Commissioner Evans had no power or authority under 7 & 8 Vict. c. 96, s. 6, to order the now defendant to discharge

es out of his custody as to the execution in such ac-
 secondly, that under the above circumstances the
 order affords no protection or indemnity to the now
 dant; thirdly, that it is immaterial whether the de-
 nt, at the time of discharging Foulkes, had notice of
 nature of the action or not; that it was not the duty
 plaintiff to give him any such notice; that the de-
 nt was bound at his peril to ascertain the nature of
 id action, by inspecting the judgment roll, or the writ
 sa., or by inquiries of the plaintiff's attorney, or
 wise; and that at all events the defendant had suffi-
 notice (if any were necessary) by the return to the writ
 eas corpus, which mentions the ca. sa., in which the
 of action is stated. Notice of a writ is notice of the
 nts of such writ.

case was argued in Easter Term last (April 23) by

1845.
 THOMAS
 v.
 HUDSON.

rtin, for the plaintiff, in support of the demurrer. The
 on is, whether the commissioner had any jurisdiction
 hority under 7 & 8 Vict. c. 96, s. 6, to order Foulkes's
 rge as to the execution at the suit of Thomas, in an
 of *tort*. He had no such jurisdiction, and therefore
 ea affords no answer to the action. The former act,
 Vict. c. 116, s. 1, enabled any person, not being a
 , or being a trader and owing less than £800, to
 it a petition to the Court of Bankruptcy, stating the
 owing by and to him; and thereupon, the commis-
 to whom the same shall be referred may grant the
 mer a protection from all process whatever, either
 t his person or his property. But it was held in
 per v. Joy (a), that that act did not apply to persons
 tody at the time of petitioning. The stat. 7 & 8
 2 96, extended its provisions to prisoners in execu-
 pon judgments obtained in actions for the recover-

(a) 4 Q. B. 172; 3 G. & D. 619.

1845.
 THOMAS
 v.
 HUDSON.

ing of debts. The sixth section enacts, "that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the said statutes relating to bankrupts, or being a trader within the meaning of the said statutes, owing debts amounting in the whole to less than £300, may be a petitioner for protection from process; and every such petitioner to whom an *interim order* for protection shall have been given shall not only be protected from process, as provided by the said recited act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution, to discharge such petitioner out of custody as to such execution without exacting any fee, and such officer shall hereby be indemnified for so doing; and no sheriff, gaoler, or other person whatsoever, shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his *interim order* from all process for such time as the commissioner shall by such *interim order* or any renewal thereof think fit to appoint, until the making of the *final order* for protection, in the same manner as if such petitioner had not been a prisoner in execution."

That section is confined to persons in execution upon a judgment in an action for the recovery of a debt, and the indemnity there given to the gaoler is confined to that case. That this section does not include a case like the present, is further shewn by the 22nd, 23rd, and 24th sections. The 7th section provides, that, where the petitioner is a prisoner in custody under any process, execution, &c., and not entitled to his discharge in manner aforesaid, the

commissioner may, by warrant, order the prisoner to be brought before him for examination. Then the 22nd gives the commissioner power to make a *final* order for protection, which is to protect the person of the petitioner from being taken or detained under any process whatever, in actions of tort as well as debt; and the 23rd section provides, that, if any such petitioner shall be detained in prison for any debt or claim, in respect of which he is protected from process by his final order, it shall be lawful for the commissioner to order any officer, who shall have such petitioner in custody, to discharge him. But in the 24th section there is an exception as to cases where the debt was contracted (amongst others) by reason of any judgment in any action of assault and battery; and it provides, that the commissioner shall not be authorized in any such case to name any day for making such *final* order, or to renew such *interim* order; and where any such petitioner shall have been discharged out of custody by order of the commissioner under the former provision, such petitioner shall be remanded to his former custody. The commissioner had, therefore, no authority to order Foulkes to be discharged out of custody; and therefore his order affords no protection to the now defendant, and he is liable to the plaintiff for an escape. Authority was first given to the commissioner by the stat. 1 & 2 Will. 4, c. 56, s. 1, by which the Court of Bankruptcy was established. That statute confers on the Court of Bankruptcy, and the judges and commissioners thereof, all the rights and powers of a court of record, or a judge of a court of record; but it gives them no power to order a debtor to be discharged out of custody. [*Alderson, B.*—A Judge of the Court of Exchequer has no jurisdiction to order a prisoner of the Court of Queen's Bench to be discharged out of custody, although a Judge of any one of the courts has such power, in certain cases, specially provided for by act of Parliament.] The true meaning of that clause is, that the

1845.

THOMAS
v.
HUDSON.

1846.
 THOMAS
 v.
 HUDSON.

Court of Bankruptcy shall be a court of record, and that they shall have the same jurisdiction over matters in their own court as other courts have. The commissioners of bankruptcy have no power to discharge prisoners out of custody, except that which is specially given them by the recent stat. 7 & 8 Vict. c. 96; and the very fact of that statute being necessary to enable them to do so shews that before they had no such power. That being so the authorities establish, that a gaoler, who allows a prisoner to go at large in obedience to an order for that purpose, is not protected, unless the Court had jurisdiction to make the order. In *Colston v. Ross (a)*, which was an action on the case against the Sheriffs of York for an escape, the defendants pleaded, that they let the prisoner at large by reason of a writ of privilege awarded by the council of York; and the plaintiff therefore demurred, because they did not allege the authority of the council there. The Court held, that "the bar was not good, and that the sheriffs, although they let him at large by colour of the writ of privilege, yet the writ not being a good warrant, they are responsible to the plaintiff; for they, at their peril, are to take heed what warrant they had to let him out of custody." And in an anonymous case in *Salkeld (b)*, where, in an action of debt for £200 upon a bond, conditioned to pay £100 for want of bail, the defendant was committed to the Marshal, and he applied to the justices of the peace of Surrey, and procured a discharge under the then Act for the Relief of Insolvent Debtors; the plaintiff obtained an escape-warrant, upon which the defendant was taken up; upon a motion to be discharged, the Court held this was an escape; for being a prisoner both indebted and also charged in above £100 debt and damages, the justices had no authority for what they did; and therefore the discharge was illegal and void. That is an

(a) Cro. Eliz. 893.

(b) 1 Salk. 273.

analogous case, for there the justices were a court empowered to make an order for the defendant's discharge, but made the order in a case in which they had no authority. So here, the commissioner had no authority to discharge Boulkes under the particular circumstances of the case. So also, in *Brown v. Compton (a)*, where the stat. 37 Geo. 3, c. 12, authorized the justices of the peace "at the first or general quarter session or general session to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances, the justices in session, at an adjourned sessions held just after the act passed (the adjournment being of a session holden before the act passed), ordered the keeper of the sheriff's prison to discharge an insolvent; and it was held that the officer was not justified in obeying the order of sessions, and that the sheriff was answerable to the plaintiff, whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent. The only doubt here was as to the correctness of the decision in *Orby v. Lales (b)*, where it was adjudged, that, if the justices at the quarter sessions make an order, by virtue of 2 W. & M. c. 5, for the discharge of poor prisoners, which order is not warranted by the statute, (as if the prisoner were in execution for more than £100), and the sheriff discharged the prisoner accordingly, he should not be liable to an escape; but the Court directly overruled that case. The argument for the defendant there proceeded upon the assumption, that the justices at sessions had a general jurisdiction over the subject-matter; but Lord *Kenyon* denied that to be true, and his Lordship said in conclusion, "that the adjourned session had no authority to make the order, and that the defendant (the sheriff), whose servant discharged the prisoner, is answerable to the plaintiff in this action." Here the foundation of the argument for the defendant

1845.
 THOMAS
 v.
 HUDSON.

(a) 8 T. R. 424.

(b) 1 Ld. Raym. 3.

1845.
 THOMAS
 v.
 HUDSON.

probably will be, that the commissioner had a general jurisdiction; but he had only the special authority conferred upon him by the recent statute. *Grose, J.*, also says in the same case, "I take it to be a clear proposition that, if a court, not having jurisdiction, order an officer to do an act, and the officer obey the order, he is not justified. I confess I was surprised, when the case from 1 Ld. Raym. 3 (*Orby v. Hales*) was cited; because, if it were law, it would overturn the *Marshalsea case* (a), and all the other authorities upon the subject." And he before had said, that that case "had been considered as the fundamental law on this subject ever since." One of the rules laid down in the *Marshalsea case* is, that, "where the Court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party who sues, or the officer or minister of the Court who executes the precept or process of the Court; but, where the Court has not jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions lie against them without any regard of the precept or process." [*Alderson, B.*—In a case in this term, of *Watson v. Bodell* (b), we held that an action of trespass was maintainable against a person for acting under a warrant of a commissioner of bankrupts at Birmingham, and detaining the plaintiff in custody under it, because the commissioner had no jurisdiction to make the warrant.] *Spence v. Jones* (c), where it was held that commissioners of bankrupt were authorized by 49 Geo. 3, c. 121, s. 13, to bring up a bankrupt charged in execution, for the purpose of a full disclosure of his estate and effects, was decided, not on the ground of any general power that they possessed, but that, under the act, they had such a power to order the prisoner to be brought up to be examined. That, so far from being an authority against the plaintiff, is the other

(a) 10 Rep. 68.

(b) Ante, 57.

(c) 5 B. & Ald. 705.

may. *Saffery v. Jones* (a) will, perhaps, be relied upon ; but the 81st section of the Insolvent Act (7 Geo. 4, c. 57) upon which that case arose indemnified the gaoler for anything done by him in obedience to *any* order of the Court. *Parke, J.*, there says, "The express purpose of this section seems to be, to make the order of the Court itself a protection to the gaoler." In *Savory v. Chapman* (b), which was an action of debt against the Marshal for an escape, to which he pleaded that he discharged the prisoner by order of the plaintiff's attorney, it was held that the plea was insufficient, because it neither shewed express authority for the plaintiff to his attorney, nor that the damages and costs had been paid to the plaintiff or his attorney. That case proceeds on the assumption that the Marshal was bound to ascertain whether the attorney had the plaintiff's authority to order the discharge. In *Mitchell v. Foster* (c), which was trespass against a magistrate for a seizure under his distress warrant under the Excise Act, (4 & 5 Will. 4, c. 51, s. 19), which required the summons to be served *ten days at the least* before the time appointed, it was held that the conviction was bad, it appearing that ten days' notice only, and not ten *clear* days' notice, had been given, and that it was no defence to an action of trespass for enforcing it. There it was argued by Sir *John Campbell*, Attorney-General, that the distinction was, that, where justices have a general jurisdiction over the subject-matter, however erroneous their decision may be in point of law, it is not thereby void ab initio ; but *Williams, J.*, says (d), "The Attorney-General contends, that it is sufficient if the justice has jurisdiction generally over the subject-matter of the complaint ; but that is not so, for he must also have jurisdiction over the particular case to which the statute applies." That shews that it is not enough that the com-

1845.

THOMAS
v.
HUDSON.

(a) 2 B. & Ad. 598.

(c) 12 Ad. & Ell. 472 ; 4 Per.

(b) 11 Ad. & Ell. 829 ; 3 P. & D. 150.

D. 604.

(d) 4 P. & D. 154.

1845.
 THOMAS
 v.
 HUDSON.

missioner had a general jurisdiction, but that he must also have jurisdiction in the particular case. [*Alderson, B.*—That is, that, to make his act justify any other person, he must have a right to do the act]. Whether this act justified the gaoler in discharging Foulkes depends upon the authority of the commissioner to order his discharge. In *Colston v. Ross* (a), it is said that the gaoler acts at his peril, and the same is also said in *Brown v. Compton* (b) by *Grose, J.* And in this case the defendant had sufficient notice of the want of authority in the commissioner. Of course he must be taken to know the law, and he says in this plea that he had no notice of the plaintiff's cause of action, except as it appeared from the return to the habeas corpus cum causâ; but it does not say that he had no means of putting himself in possession of such knowledge. A person who has notice of the existence of a judgment has notice of its contents, for it is open to everybody to search the roll. In *Jackson v. Rowe* (c), it was held that a plea of purchase for valuable consideration, without notice, is no protection against an adverse claim, which the purchaser might have had notice of by using due diligence in investigating the title.

W. H. Watson, contra.—The defendant is entitled to protection under the stat. 7 & 8 Vict. c. 96, s. 6. The commissioner had a general jurisdiction over the subject-matter; and, although he may have made an erroneous order, the defendant is not responsible for acting in obedience to it. By the stat. 1 & 2 Will. 4, c. 56, the Court of Bankruptcy is made a court of record, and every commissioner of that court has, in respect of matters within his jurisdiction, the same powers and privileges as a judge of a court of record. But all doubt upon that subject has been removed by 5 & 6 Will. 4, c. 29, s. 25, by which it is

(a) Cro. Eliz. 893.

(b) 8 T. R. 424.

(c) 2 Sim. & Stu. 472.

enacted, that the court of review and the several subdivisions' courts respectively shall henceforth be and shall be deemed and taken from and after the passing of the said first-recited act (1 & 2 Will. 4, c. 29) to have been courts of record, and shall and may have and exercise all such powers of commitment as were vested in commissioners of bankrupt acting as such at the time of the passing of the said first-recited act, and shall and may have, use, and exercise all the powers, rights, privileges, and incidents of a court of record, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law at Westminster; "and every judge or commissioner appointed or to be appointed by virtue of the said first-recited act, sitting alone and acting in execution of the duties imposed upon him as such judge or commissioner, shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a court of record." Suppose, upon application to a commissioner, there is some doubt whether the case is one over which he has jurisdiction, but he nevertheless adjudicates upon it, would not all persons acting under his order be protected by it? [*Alderson*, B.—That would depend upon whether he had jurisdiction to make the order; he cannot give himself jurisdiction by making the order.] If the order is good upon the face of it, the gaoler is not bound to inquire whether the commissioner had authority to make it. The general rule is, that an officer must look to the writ, and not to the judgment; and, though the judgment does not warrant the writ, he may justify under it. In this case the gaoler could have no knowledge of the nature of the action; for it would not appear from the writ that the action was for an assault; and the gaoler would not be justified in detaining the prisoner in custody until he had informed himself as to what the nature of the action was. It is for the commissioner to determine what cases are within his jurisdiction. The argument on the other side must go to this extent: that, if after

1845.
 THOMAS
 v.
 HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

a trader was discharged upon an interim order, it should turn out that his debts exceeded £300, the gaoler would be responsible for having obeyed the order. Supposing this Court put an erroneous construction on an act of Parliament, would not the officers of the Court be bound to obey it? Or, if a ca. sa. issued without a judgment to support it, would not the sheriff be justified in acting under it? [*Alderson*, B.—He would be justified, because the Court had jurisdiction to issue a ca. sa.] The 24th section of the 7 & 8 Vict. c. 96, shews that it is the commissioner who is to determine whether or not the action is for a debt. That section enacts, that, “if, on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust,” &c., or “by reason of any judgment in any action for assault, battery, &c., the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody.”

It is clear from this section, that the commissioner has jurisdiction in all cases to make the interim order; but if it afterwards turns out that the prisoner was in custody by reason of any of the causes enumerated, then the commissioner is to remand him to his former custody. It cannot be that the officer is to be responsible for acting under such order of the commissioner, however erroneous it may be. In *Ex parte Partington* (a), this Court held that the commissioner had a right to remand, though on a

(a) 13 M. & W. 679.

and not specified in the 24th section, such right being
 dependent to his jurisdiction to grant the interim order. Sup-
 pose the commissioner expressly to decide that the action
 is for the recovery of a debt, and to order the prisoner's
 discharge, the gaoler surely would not be responsible for
 giving the order. [*Pollock*, C. B.—Suppose a special power
 is conferred upon the Court of Queen's Bench, and they
 are to put an erroneous construction upon the act of
 Parliament conferring it, and were to make an order, is
 the officer to be responsible for obeying it? I think not.]
 The officer is not liable for obeying any order made under
 mistake of law or fact. Under section 6, it is for the
 commissioner to determine whether the prisoner is in exe-
 cution upon a judgment in an action for the recovery of a
 debt; or not; and the commissioner is empowered to order
 the officer, in whose custody he may be, to discharge him,
 and such officer is thereby indemnified for so doing. No
 action for an escape can surely be maintainable for such
 discharge. [*Alderson*, B.—It might be a difficult ques-
 tion to decide, whether a man is or is not a trader. Sup-
 pose the commissioner to decide erroneously, is the officer
 liable? So, if he is a trader and owes more than
 £300. In either case the commissioner would have no
 jurisdiction, but his wrong determination cannot make
 the officer responsible—he is protected by the act. *Pol-*
lock, C. B.—I am unwilling to interfere, not having heard
 the whole of the argument; but it seems to me that the
 gaoler is no more responsible than if it turned out that the
 prisoner was not a trader, or that he owed more than £300.
 There was no necessity to insert the indemnity clause, ex-
 cept to provide for a case like the present, where the mat-
 ter was not strictly within the act.] How is the officer
 to know whether the prisoner has not obtained his final
 order for protection mentioned in the 23rd section, in
 which case he must obey the order of the commissioner,
 and is expressly indemnified for so doing? No doubt it is

1845.

THOMAS
 v.
 HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

pleaded as an interim order; but still it is important that there is a power to discharge where the party has a final order. The sixth section no doubt says, that the commissioner may deal with the case of an action for the recovery of a debt, and not with the case of an action for the recovery of damages in tort; but he still has the power of dealing with cases of the latter description in a certain stage of the proceedings. The commissioner, therefore, had a general jurisdiction to make the order; and the keeper of the Queen's Prison was justified in acting in obedience to it. *Saffery v. Jones* (a) is an express authority for this. It was there held, that it is a good defence to an action against a sheriff or gaoler for an escape, that he discharged the prisoner from custody by virtue of an order of the Insolvent Court; and that he need not shew that the proceedings upon which the order is grounded were properly taken. In the course of the argument in that case, *Parke, B.*, said,—"The Legislature never could have intended to throw upon the gaoler the onus of examining into the accuracy of all the previous proceedings, and that the prisoner should be detained until such examination had been made." In *Marsh v. Woolley* (b), it was held that an interim order under 5 & 6 Vict. c. 116, if in the form prescribed in the rules promulgated by the Judges and commissioners of the Court of Bankruptcy, need not shew on the face of it the jurisdiction of the commissioner to make the order. In *Colston v. Ross* (c), there was a total want of jurisdiction; and in *Brown v. Compton* (d), the want of jurisdiction appeared on the face of the order itself. *Savory v. Chapman* (e) will be found to have no application to the present case; for there the Marshal discharged the prisoner without sufficient authority. *Andrews v. Mar-*

(a) 2 B. & Ad. 598.

(d) 8 T. R. 424.

(b) 5 Man. & Gr. 675; 6 Scott,
 N. R., 555; 1 D. & L. 84.

(e) 11 Ad. & Ell. 829; 3 Per.
 & D. 604.

(c) Cro. Eliz. 893.

ris (a) and *Carratt v. Morley* (b) are authorities which shew clearly that the officer executing the process of a court is protected, though the court issuing the process had no jurisdiction. *Moravia v. Sloper* (c) is also an authority to the same effect.

1845.
 THOMAS
 v.
 HUDSON.

Martin, in reply (May 6).—The sixth section of the statute affords no protection to the defendant. That section limits the authority of the commissioners to cases where the judgment is substantially for a *debt*,—such as might be proved under the commission; and this is strongly confirmed by the 24th section. All the matters there mentioned amount to debts, as soon as there is a judgment. Nor is the gaoler under any such difficulty as is suggested on the other side; for the form of action is set out in the writ, (see the forms, Jervis's Rules, p. 158); and he had, therefore, the direct means of obtaining knowledge as to the legality of the order. It is said that, whether the commissioner was or was not authorized to make the order, the gaoler was justified by it in discharging the plaintiff. But the gaoler is not an officer of the Court of Bankruptcy at all; he is an officer of the superior Court, appointed under statute; and is justified only in obedience to *legal* orders of any other authority. Here, the very authority under which he held the plaintiff, to see which he had only to go to the sheriff's office, would have informed him of the nature of the action, and of the invalidity of the order. *Saffery v. Jones* was decided on the stat. 7 Geo. 4, c. 57, s. 81, which gives a full indemnity to sheriffs, gaolers, &c., doing any thing in obedience to "any order" of the Insolvent Debtors Court: whereas here they are indemnified only as to "such petitioner" as is mentioned in the preceding part of the clause;

(a) 1 Q. B. 3; 1 G. & D.
 268.

(b) Willes, 30.

(c) 1 Q. B. 18; 1 G. & D. 275.

ards, on the 8th of July, 1844, brought up by habeas
; was regularly committed by the late Mr. Baron
y to the Queen's Prison, in execution for the residue
sum of 150*l.* 3*s.* 7*d.* so recovered. The declaration
vers, that the defendant, being keeper of the said
received the said Foulkes and had him in custody
said commitment, and afterwards wrongfully suf-
him to escape.

defendant, by his plea, states that Foulkes, after
l commitment in execution, to wit, on the 30th day
ember, 1844, presented his petition to the Court of
aptey, praying relief under the 5 & 6 Vict. c. 116,
& 8 Vict. c. 96, with a schedule of his debts an-
to the petition, such schedule including the sum
the plaintiff; that, at the time of presenting the
tition, Foulkes was not, nor ever had been, a trader;
at he was at the time a prisoner in execution on a
ent obtained by one Robert Croft for a debt of
; that, after the petition was presented, Mr. Joshua
one of the commissioners of the Court of Bank-
gave the petitioner an interim order of protection,
erwards, and whilst Foulkes was in defendant's cus-
amely, on the 1st of October, 1844, made an order
defendant to discharge Foulkes; in obedience to
order the defendant did discharge him. The plea
vers, that the defendant had no notice of the nature
plaintiff's action, save as it appeared from the habeas
under which Foulkes was brought up before Mr.
Gurney, and the sheriff's return, by which latter
ent the sheriff stated, that he had Foulkes in cus-
ider a writ of ca. sa. to satisfy the plaintiff a sum of
s., residue of 150*l.* 3*s.* 7*d.* damages in the said writ
ned.

his plea there is a general demurrer; and the ques-
r our decision is, whether the order of Mr. Com-
ier Evans affords a good justification to the defend-

1845.
THOMAS
v.
HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

ant for his discharge of Foulkes; and this depends on the question, what powers were conferred on the commissioner by the recent statutes of 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. By the former statute, it is enacted, (section 1), "that any person not being a trader, or being a trader and not owing debts to the amount of £300, may, after giving certain notices, present a petition to the Court of Bankruptcy, praying protection from process, to which petition is to be annexed a schedule containing a full statement of his debts and assets of every description." And on the filing of such petition, the commissioner is empowered to give to the petitioner a protection from all process, either against his person or his property, until his appearance in court for examination at a day to be appointed for that purpose; and on the presentation of the petition, all the property of the petitioner becomes vested in the official assignee.

The order so to be given is pursuant to certain rules framed under the authority of the act, called the interim order, and is in force only until the appearance and examination of the petitioner; but if the examination is not concluded at one sitting, it may be renewed from time to time until the final examination, on the completion of which, if the commissioner is satisfied of the truth of the allegations in the petition, and that the debts of the petitioner were not contracted by any fraud, or breach of trust, or on any criminal prosecution, or without reasonable prospect of being able to discharge them, or by reason of any judgment for breach of the revenue laws, or in certain enumerated actions of a criminal nature, *including actions for assault*, and is also satisfied that the petitioner has not, since his petition, parted with any of his property, he may give the petitioner a final order protecting his person from all process, and vesting his estate in assignees for the benefit of his creditors.

By the subsequent statute, 7 & 8 Vict. c. 96, it is enacted,

n section 1, that the petition may be presented without the notices originally required ; and by section 6, it is *declared* and enacted, that any prisoner in execution on any judgment obtained in any action for the recovery of a debt, not being a trader, or, being a trader and owing debts under £300, may be a petitioner for protection from process ; and every such petitioner, to whom an interim order shall have been given, shall not only be protected from process, but also from being detained in prison in execution on any judgment obtained in any action for the recovery of any debt mentioned in the schedule ; and it shall be lawful for the commissioner to order any officer having any such petitioner in custody on any execution on any such judgment to discharge him ; and such officer shall not be liable to any action for an escape by reason of his so doing.

These are the sections of the two acts on which the present question mainly turns.

The plaintiff argued, that they did not warrant the order of the commissioner ; for that the only detainer in execution, which the interim order of protection can reach, is a detainer in execution on a judgment for a debt ; whereas here the judgment is a judgment in an action of assault and false imprisonment.

The defendant, on the other hand, contended, that the order extends to all sums mentioned in the schedule as debts ; or, if that is not so, that, at all events, the defendant, the gaoler, was bound to obey the order, whether warranted by the statute or not, as being an order made by a Judge in a matter over which he had jurisdiction.

With regard to the first point, namely, what are the judgment debts, from detention on account of which the Legislature meant that the interim order should be a protection, there is certainly some difficulty. Supposing the petition to be presented under the first statute, by a party not in custody, it is clear the interim order, during its subsistence, would have been a protection from all process

1845.

THOMAS
v.
HUDSON.

ratory as well as enactive), that the circumstance of the petitioner not being at large should in this respect make difference, and that, as he would have been temporarily protected from process if he had been at large, so he ~~should~~ be temporarily set at large if in confinement. Though this reasoning is not without its weight, yet, on the other hand, the words of the sixth section are very strong indeed in favour of the more limited construction contended for by the plaintiff. The enactment is, that the interim order shall protect the petitioner from being detained in prison, in execution *upon any judgment obtained in any action for recovery of any debt mentioned in his schedule*. If this had been the only part of this section in which these words had occurred, we might, perhaps, have been inclined to do some violence to the language, and to hold that the provisions applied to all sums due on judgments mentioned in the schedule as debts. But, the same words, "*action for the recovery of any debt*," occur in the beginning of the clause; and we think, in that first part of the clause, they are clearly meant to apply exclusively to judgment debts recovered in actions of debt; not, perhaps, confining the meaning of those words to actions of debt properly so called, but extending them also to judgments in actions on contracts for sums popularly called debts; certainly, however, excluding the case of parties against whom judgment had been recovered in actions of debt. Now, if this narrower construction be that which is to be adopted in the early part of the section, where the words are used for shewing to what class of judgment debts in execution the right of petitioning is given, it is not difficult to say, that a different and wider sense is to be attributed to them in the following sentence of the same section, where they are used to shew the debts against execution for which the interim order is to be a protection. The 7th, 23rd, and 24th sections of the second act, which we shall presently advert for another purpose,

1845.

THOMAS
v.
HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

tend to confirm the construction contended for by the plaintiff. And, on the whole, if it were necessary to come to the point, we should probably feel bound to say that the plaintiff was right, and that the judgment debt against Foulkes was not one which the statute intended the interim order to affect. It is not, however, absolutely necessary for us to come to any judicial decision on this point, inasmuch as we are of opinion that, on the second point, the argument of the defendant is clearly right, and whatever be the true construction of the act, the defendant was bound to obey the order of the commissioner, and that of a judge acting in a matter over which he has jurisdiction.

The argument of the plaintiff was, that although the court of the commissioner is now to certain purposes a court of record, yet that, in cases under the two statutes in question, he is acting not as a judge in discharge of ordinary functions, but as a party exercising a special authority conferred on him by act of Parliament, and his authority therefore fails altogether, if attempted to be exercised in any case not strictly *within* the terms of the statute conferring it; the power, it is said, is only to discharge the party petitioning from imprisonment on any *such* judgment, i. e. looking to the context, from a judgment obtained in an action for the recovery of a debt, and the commissioner, as to any judgment obtained in any other case than an action for the recovery of a debt, has no power to order the prisoner's discharge than he would have to order the discharge of a party who had not petitioned. Now, this argument, it must be observed, goes a great deal further than merely to limit the quality of the debts to which the interim order shall be available. If good, it certainly shews that the order will only be available in any *such* petitioner, i. e. looking to the context, to a petitioner who either was not a trader, or who, being a trader, did not owe so much as £300, and, under the first ac-

had given certain notices thereby required. Now, although the gaoler might perhaps be able to ascertain whether the petitioner was in his custody on a judgment obtained in an action of debt, or an action of tort, yet it would be obviously impossible for him to ascertain whether any prisoner in his custody, being a trader, owed debts exceeding £300.

The argument of the plaintiff must go the full length of contending, that, if a party in custody in execution on a judgment for a debt should present a petition, alleging that he was not a trader, or, being a trader, that his debts were under £300, and should obtain an interim order of protection, and an order for his discharge, the gaoler, if the allegations of the petition are true, would be bound to discharge him, if false, to detain him; and that, in the first case, if he did not discharge his prisoner, he would be liable to an action for false imprisonment; and in the second, if he did discharge him, he would be liable to an action for an escape. The course to be pursued by the gaoler is thus made to depend on the truth or falsehood of certain allegations, the truth or falsehood of which he has no means of ascertaining, so that, without any default on his part, he may become liable to actions to any amount, and find himself ruined without the possibility of redress. This appears to us so nearly a *reductio ad absurdum*, that, if there be any construction of the act by which such a consequence may be avoided, we feel bound to adopt it. Mr. *Martin*, indeed, contended that there was no such absurdity in the conclusion to which his reasoning necessarily led, or at all events, that, if it be an absurdity, it is only an absurdity which the law tolerates in many analogous cases; and he referred to the case of the messenger, assignees, and others acting under commissions of bankrupt, all of whom act on the faith of the adjudication, and who, except so far as more modern statutes have protected them, are certainly responsible for all they do, if it should turn out that the party was er-

1845.
THOMAS
v.
HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

roneously adjudged to be a bankrupt. There appears, however, to us to be a clear distinction between the two cases. In the cases suggested by Mr. *Martin*, the parties acting are all volunteers. They may act or not, as they see fit; whereas, in the case before us, the defendant has no choice—the debtor is in his custody by the act of the law, and the gaoler is bound to keep him, unless discharged by competent authority. The law, therefore, which should impose on him the obligation of acting at his peril as to the facts, would be very different from that which applies to the ordinary case of bankruptcy. In the one case the party must act—in the other he may act or may abstain from acting as he may see fit.

It only remains, therefore, to see whether the language of the statute is such as to justify us in saying that the Legislature meant, in a case like the present, to make the judgment of the commissioner conclusive. Now, construing the two acts together, the petition, it is to be observed, must be accompanied with an affidavit verifying its truth; and it must contain a statement that the petitioner is not a trader, or, if a trader, that his debts are under £300. It must also contain a full account of his debts, stating their dates and nature, with certain other particulars. This petition, so verified, being thus before the commissioner, the first statute, sect. 1, enacts, that it shall thereupon be lawful for the commissioner to give the interim order of protection; and the second statute, that, if any such petitioner shall be in execution on any such judgment, it shall be lawful for the commissioner to order the gaoler to discharge him. The words, it must be observed, are, *it shall be lawful* for the commissioner, &c. And we think this sufficiently shews that the commissioner is to act not ministerially, but judicially—he is to come to a decision on the petition and affidavits, not, indeed, a decision as to whether a petitioner, having complied with the requisites of the act, shall or shall not have his interim order, or his order

of discharge, for to these he is in such case clearly entitled, but whether he has or has not done what the statute imposes as the conditions on which he would become entitled to those privileges.

If the petition should on the face of it shew that the petitioner was a trader, and it should appear by the schedule that his debts amounted to £300, it would certainly be the duty of the commissioner to withhold the interim order. And if a petitioner, being in custody, should become entitled to his interim order, it would yet be the duty of the commissioner to withhold his order of discharge in respect of any judgment, if such there should be, not coming within the description of a judgment obtained in any action for the recovery of any debt mentioned in the schedule. The commissioner, it is true, has but very imperfect means of enabling him to come to a decision in these matters; nothing but the petition and affidavit; still he has these documents, and on these he must exercise his judgment, and by that judgment all persons must be bound. The decision may be wrong, but it is a decision by the proper authority, and, if wrong, comes within the principle laid down in the *Marshalsea case*, that orders by a competent authority, though made *inverso ordine*, are a protection to those who act under them.

The correctness of this view of the statute seems to us to be strongly confirmed by some subsequent clauses. Section 7 enacts, that, when any petitioner is a person in execution, and not entitled to his discharge under section 6, the commissioner may by warrant cause him to be brought up for examination. This shews that the commissioner is, on the facts before him, to decide whether the execution is or is not one in respect of which the petitioner is entitled to a discharge, and he is to act accordingly. Again, after the final examination, the commissioner is, by sect. 23, to order the petitioner to be discharged from custody, in respect of all debts to which the final order shall extend,

1845.
THOMAS
v.
HUDSON.

1845.
 THOMAS
 v.
 HUDSON.

i. e. all debts whatever, except those which the commissioner shall decide to come within the exceptions contained in sect. 24. Now here it is quite clear the commissioner was intended to exercise functions strictly judicial, and no one can doubt but that his adjudication as to the final order is absolutely conclusive; and it appears to us, independently of all other considerations, to the last degree improbable that the Legislature meant to give to one class of the commissioner's acts a character and effect different from that which is given to the others; to compel third persons to obey the final adjudication, and to protect them in that obedience, but in the meantime to leave them to act at their peril as to intermediate proceedings.

The provisions referred to in the argument, at the latter part of sect. 24, whereby the commissioner is directed to remand to custody any person who, on his examination shall turn out to have been erroneously discharged under sect. 6, tends strongly to confirm us in the view we have taken of the statutes. On these grounds, therefore, being strongly inclined to go along with the plaintiff in his first proposition, namely, that his debt was not one from which Foulkes ought to have been discharged by the commissioner, we yet think that he has no right of action against the defendant, he having only obeyed the order of a Judge in a matter over which he had jurisdiction; and our judgment must, therefore, be for the defendant.

Judgment for the defendant.

1845.

PHILLIPS v. WARREN.

June 18.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for £20, dated 1st March, 1843, drawn by W. Palmer, payable three months after date, and indorsed by him to the plaintiff.

The defendant pleaded, (amongst other things), first, that he the defendant paid the bill on the day when it became due, and that it was indorsed by Palmer to the plaintiff after it became due; secondly, that the defendant paid the bill when it became due, and that it was afterwards put into circulation, and so required a new stamp. The replications to these pleas denied the payment as alleged. At the trial, before Lord Denman, C. J., at the next assizes for Surrey, the evidence given in support of the allegation of payment in the pleas was as follows:—On the morning of the day when the bill became due, Messrs. Barclay & Co., the bankers, being then the holders of it, the bill was in due course presented to the defendant for payment, but was not then taken up by him. On the afternoon of the same day, a person called at Messrs. Barclay's, and paid the amount of the bill to one of the clerks, who indorsed a general receipt on the back of the bill, and handed it back to him. The clerk did not know this person, nor was there any evidence to shew who he was. The defendant had not any account with Barclay & Co. The bill was produced at the trial by the plaintiff. The learned Judge thought there was no evidence of payment *by the acceptor*, and, under his direction, the plaintiff had a verdict.

The acceptor of a bill of exchange, on its presentation to him when due, did not take it up; but afterwards, on the same day, a person unknown called at the bankers' where it lay, and paid the amount, and received back the bill, with a general receipt indorsed upon it. In an action by the indorsee against the acceptor, the bill was produced by the plaintiff, bearing that receipt:—*Held*, no evidence of payment of the bill by the acceptor.

In Easter Term, *Montagu Chambers* obtained a rule nisi for a new trial, on the ground of misdirection, relying on *Scholey v. Walsby* (a) as an authority that the receipt was

(a) Peake, N. P. C. 34.

1845.
 PHILLIPS
 v.
 WARREN.

prima facie evidence of payment of the bill by the acceptor.

Byles, Serjt., now shewed cause. The mere receipt indorsed on the bill can be no evidence whatever of payment of the bill *by the acceptor* : more especially under circumstances which were proved in the present case, that payment of the bill had previously, on the same day, been *refused* by the acceptor, and that it came out of the hands of the plaintiff at the trial. [*Alderson*, B.—Why may *he* have been the party who paid it?] It is quite possible, and even probable, that he was. If the acceptor had paid it, surely the bill would have been in his possession

Montagu Chambers, contra.—*Scholey v. Walsby* is an authority expressly in point, that the receipt indorsed on the bill is *prima facie* evidence of payment by the acceptor, and that it is not evidence of payment by the drawer, although it be produced by him at the trial. That case appears to be recognized in *Graves v. Key* (a). Here no evidence was given to repel the presumption in favour of the acceptor, arising out of the payment of the bill on the day when it became due, and the receipt given for it.

ALDERSON, B.—It is sufficient to say, with respect to the case of *Scholey v. Walsby*, that the doctrine of Lord Kenyon in that case certainly ought not to be carried any further. But in the present case there are circumstances to shew that the acceptor did not pay this bill. The receipt itself shewed nothing, until it was explained ; and therefore the bankers' clerk was called, who stated, that, on the afternoon of the day when the bill became due, he gave the receipt to a person whom he did not know. This, coupled with the fact that the acceptor had previously, &c.

(a) 3 B. & Adol. 318.

the same day, refused payment of the bill, appears to be reasonable evidence of his not having been the person who paid it. It seems to me that the verdict was right upon the evidence, as it was presented to the jury.

1845.
PHILLIPS
v.
WARREN.

ROLFE, B.—I am of the same opinion. I own I do not very well understand the case of *Scholey v. Walsby*. No doubt, under some circumstances, the receipt on the back of the bill *may* be evidence of payment by the acceptor, although it is more likely to have been paid by some other party, because, if paid by the acceptor, it would naturally have been in his possession.

Rule discharged.

JACKLIN v. FYTCHE and Another.

June 19.

TRESPASS against the defendants, two justices of the peace acting for the parts of Lindsey, in the county of Lincoln, for assault and false imprisonment.—Plea, not guilty, by statute. At the trial, before *Tindal*, C. J., at the last Lincoln Assizes, the plaintiff proved a notice of action to the defendants in the following terms:—

A notice of action to justices, under the 24 Geo. 2, c. 44, stated the cause of action thus:—"For that you, on the 10th day of May, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, &c., and to be forced and compelled to go along divers public streets and roads, &c., to a certain prison, to wit, at

"To John Fytche, Esquire, and William Teale Welfitt, Esquire, two of her Majesty's justices of the peace in and for the parts of Lindsey, in the county of Lincoln, and to each of you.

I, William Jacklin, of Claythorpe, in the county of Lincoln, labourer, do hereby, according to the form of the statute in such case made and provided, give you and each of

Louth, in &c., and to be unlawfully imprisoned and kept in prison there, for forty days then next following," &c. At the trial, the proof was confined to the imprisonment in the gaol at Louth, under an invalid warrant of the defendants:—*Held*, that the notice sufficiently stated the place of the injury, so as to enable the plaintiff to recover in respect of such imprisonment.

1845.
 JACKLIN
 v.
 FYTCH.

you notice, that I shall, by my attorney, Mr. Christopher Ingoldby the younger, of Louth, in the said county of Lincoln, gentleman, at or soon after the expiration of one calendar month from your being served with this notice, cause a writ of summons to be sued out of her Majesty's Court of Exchequer of Pleas, at Westminster, against you at my suit, and proceed thereupon according to law; for that you, on the tenth day of May, in the year of our Lord 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, seized, and laid hold of, and to be forced and compelled to go into, along, and through divers public streets and roads, to a certain prison, to wit, at Louth, in the said parts, and to be unlawfully imprisoned and kept and detained in prison there, in a dark and unwholesome place there, without any reasonable or justifiable cause whatever, for a long space of time, to wit, for the space of forty days then next following, contrary to the laws and customs of this realm, and against the will of me the said William Jacklin," &c. &c.

his

" William ✕ Jacklin,
 mark

of the parish of Claythorpe, in the parts
 and county aforesaid."

All that appeared in evidence was, that on the 10th of May, 1844, the plaintiff was delivered into the custody of the gaoler of the house of correction at Louth, upon a warrant of commitment for two calendar months to hard labour, signed by the defendants, under the Master and Servant Act, 4 Geo. 4, c. 34, which was admitted to be invalid. A habeas corpus was subsequently obtained on behalf of the plaintiff, and he was discharged by order of the Court of Queen's Bench on the 12th of June.

It was objected for the defendants, that the notice of action was insufficient, inasmuch as no *place* was alleged

with respect to the assault and original imprisonment: and *Martins v. Upcher* (a) and *Breese v. Jerdein* (b) were cited. The Lord Chief Justice reserved the point, and the plaintiff had a verdict, damages £12.

1845.
JACKLIN
v.
FYTCHE.

In last Easter Term, *Clarke*, Serjt., obtained a rule nisi, pursuant to leave reserved for that purpose at the trial, to enter a nonsuit.

Whitehurst (with whom was *Willmore*) now shewed cause.—This notice was sufficient. The present case is quite distinguishable from those of *Martins v. Upcher* and *Breese v. Jerdein*. Here the plaintiff's evidence was altogether confined, in order to avoid any objection of this kind, to the imprisonment at Louth, as to which place is alleged in the notice. But it can hardly be that any allegation of place is necessary in such a document. The justices must be cognizant of what the complaint is. [*Parke*, B.—Not necessarily.] The place of the trespass surely lies as much within their knowledge as the plaintiff's. But however this be, the cases cited are altogether distinguishable. In *Martins v. Upcher*, no place whatever was mentioned, and therefore there was no limitation as to the place to which the proof might extend. With respect to the case of *Breese v. Jerdein*, there is some discrepancy in the several reports of that case. According to the report in the Law Journal (c), the only objection to the notice at the trial would appear to have been, that it did not designate the form of the action intended to be brought; though it was decided on the ground that there was no proper allegation of time and place. There the notice was for having caused the plaintiff, on the 27th of May last past, "to be apprehended and detained in custody without

(a) 3 Q. B. 662; 2 G. & D. 720, n.

(c) 12 Law J., (N. S.), Q. B., 716.

(b) 4 Q. B. 585; 2 G. & D. 234.

1845.
 JACKLIN
 v.
 FITCHE.

any reasonable or probable cause whatsoever, for the space of three hours then next following, and having afterwards caused him to be unlawfully committed to a certain common prison called the Compter, in the city of London, and to be there imprisoned, &c., for a further space of time, to wit, the space of twelve hours then next following." No place, therefore, was mentioned, except the Compter in the city of London; and it appeared in evidence that the only defendant entitled to notice of action did not go into the city at all. He had, therefore, no notice of any place as to the trespasses committed by him. *Jones v. Nicholls* (a) is an authority for the plaintiff. There the notice stated the cause of action to be for trespass and false imprisonment, "by arresting and imprisoning the plaintiff at St. Asaph, in the county of Flint, on Tuesday the 30th day of January last, on a charge of felony, and taking him thence in custody to Denbigh, in the county of Denbigh, and for detaining him in such custody upon such charge for twelve hours or thereabouts, and also for causing him to be taken before certain justices of the peace, at Denbigh aforesaid, on the 31st day of the said month of January, on the said charge of felony:" and it was held, that this notice sufficiently alleged the *time* of the several trespasses complained of. These notices are not to be construed according to the strict rules of pleading, but as they would reasonably be understood by those to whom they are addressed.—He was then stopped by the Court, who called upon

Clarke, Serjt., and *Macaulay*, in support of the rule.—This notice was not sufficient to satisfy the meaning and spirit of the stat. 24 Geo. 2, c. 44, which requires that no writ, &c. shall be served on any justice of the peace for anything by him done in the execution of his office, until notice in writing of such intended writ or process shall

(a) 13 M. & W. 361.

have been delivered to him one calendar month before, "in which notice shall be *clearly and explicitly contained* the cause of action which such party hath, or claimeth to have, against such justice of the peace." Now it is clear, on the authority of *Martins v. Upcher*, that all the other trespasses alleged in this notice, except the imprisonment at Louth, are insufficiently stated, and the plaintiff cannot recover in respect of them. Then, what information is given to the justices, by a statement that on a certain day they caused the plaintiff to be imprisoned in the common prison of the county, to which they commit all offenders? No doubt, in all cases, the justices may inform themselves *by inquiry*; but the statute requires a notice which *in itself* shall give them all reasonable information. [*Parke, B.*—What further information could the plaintiff have given?] He might at all events have said that the defendants *committed* him to the house of correction on that day. [*Parke, B.*—Does he not say so?] No; it is an *imprisonment* for every day that he remains there, and this allegation would be proved, if he had been *committed* a month before. [*Alderson, B.*—You may at all events read the previous part of the notice, which contains no allegation of place, in order to see the meaning of that which does. Now, looking at the whole, can anybody doubt that this notice gives all reasonable information? In *Martins v. Upcher*, the notice did not tell the justice what act of his life was complained of, on what day it happened, or in what part of Norfolk.] So here, it is not pretended that the justices exercised their functions at Louth, but only that the prison is there: this statement gives them no information as to the act *they* have done. The notice should give the justices full information of all that part of the trespass in which they were *personally* concerned; it should therefore shew where they were when they acted. The very complaint may be, that the justices committed the party too far from the boundary of the county. [*Alderson, B.*—The act of Parliament does

1845.
 JACKLIN
 v.
 FYTCH.

1845.
 JACKLIN
 v.
 FYTCH.

not require the party to give notice of the *illegality*, but only of the injury. *Parke, B.*—He is only to state clearly and explicitly the *cause of action*.] The commitment may be a trespass at A. and not at B. [*Alderson, B.*—But the plaintiff is not bound to tell the defendants more than that they unlawfully imprisoned him, and when and where they did so.] If the justices have to make inquiry, of course they can thereby inform themselves as to the fact in every case; the requisition of the statute, therefore, must mean more than that. [*Rolfe, B.*—I take *Martins v. Upcher* to be an authority only that the party must give time and place as far as he reasonably can. I can conceive cases where he cannot give place. *Parke, B.*—Here, however, he does.] But the allegation of place would be satisfied, if the defendants had committed the plaintiff long before the day stated.

PARKE, B.—This rule must be discharged. The plaintiff's cause of action is, that he has been assaulted and imprisoned by the defendants: that cause of action he must describe with convenient certainty. According to the case of *Martins v. Upcher*, the first part of the trespass is not described with convenient certainty; but the imprisonment at Louth is. If the defendants had read the case of *Martins v. Upcher*, they would know that there was here quite a sufficient description of the imprisonment at Louth. *Breese v. Jerdein* is in truth an authority for the plaintiff; for there the same objection existed as to the city policeman, Bradley, and was given up upon the argument (a).

ALDERSON, B.—I am of the same opinion. The fallacy of the argument for the defendants is, that it supposes it to be necessary for the plaintiff to state *how* the act was

(a) See 4 Q. B. 586, note.

illegal, whereas it is only necessary to state that the defendants did an illegal act, and that it was an injury to the plaintiff.

1845.
JACKLIN
v.
FYTCH.

ROLFE, B.—If the case of *Martins v. Upcher* be admitted to be good law, it does not necessarily follow that the first part of this notice is bad; because there no place was mentioned; it was left in this respect in perfect ambiguity. Here I should say that it is the description of one continued act, concluding with the imprisonment at Louth. I doubt very much, therefore, whether even that part of the statement is not sufficient.

PARKE, B.—I am very much disposed to concur with my brother *Rolfe* in that opinion; but it is not necessary to decide that, because the evidence was confined to the imprisonment at Louth.

Rule discharged.

HOYLES v. BLORE.

June 19.

DEBT, in the sum of 7l. 13s. 8d., for washing, &c. The particulars of demand claimed the same sum. Plea, that, by an order of the Court for the Relief of Insolvent Debtors, the defendant, being then an insolvent debtor in actual custody, &c., was, on &c., duly discharged, according to the stat. 1 & 2 Vict. c. 110, of and from the said several premises and causes of action in the declaration mentioned, &c. Replication, traversing the discharge as alleged, and issue thereon. At the trial, before the assessor to the under-sheriff of Middlesex, the defendant's

The defendant, an insolvent debtor, inserted the plaintiff as a creditor in his schedule, but, by mistake and without fraud, stated the debt to be £3, whereas in fact it was £7:—*Held*, that, inasmuch as the creditor was thereby deprived of the benefit of the notice to be given to creditors for £5 and upwards, under the 71st section of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, this was not a case within the protection of the 93rd section, and the defendant's discharge under the act was no bar to an action for this debt.

1845.
 HOYLES
 v.
 BLORE.

discharge under the Insolvent Debtors' Act was proved; but it appeared that the plaintiff was inserted in his schedule by a wrong name, as "Mrs. Isles," and the amount of her debt was stated as £3, instead of 7*l.* 13*s.* 8*d.* It was not shewn that any notice was given to the plaintiff under the 71st section of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110 (*a*). The learned assessor left it to the jury to say, whether this mis-statement in the schedule was by fraud or by mistake; and read over to them the 93rd section of the act (*a*). The jury found that it was a mistake, and without fraud; and the verdict was thereupon, under the direction of the assessor, entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or a verdict for him.

F. V. Lee having obtained a rule nisi accordingly,

Thomas shewed cause (*b*).—The 71st section of the act

(*a*) Sect. 71 enacts, that the Court for the relief of Insolvent Debtors shall cause notice of the making every such vesting order as aforesaid, and the filing of every such schedule, and of the time and place so as aforesaid appointed for such prisoner to be brought up, to be given, by such means as the said Court shall direct, to the creditor or creditors at whose suit any such prisoner shall be detained in custody, or the attorney or agent of such creditor or creditors, and to the other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of 5*l.*, and to be inserted in the London Gazette, &c.

Sect. 93, after reciting, that it

may sometimes happen that a debt of, or claim upon, or balance due from such prisoner as aforesaid, may be specified in his schedule at an amount which is not exactly the actual amount thereof, without any culpable negligence, or fraud or evil intention, on the part of such prisoner, enacts, that in such case the prisoner shall be entitled to all the benefit and protection of the act, and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by the act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the schedule notwithstanding.

(*b*) June 10, before *Parke*, B., sitting alone.

expressly requires notice to be given of the vesting order, the filing of the schedule, and the time and place appointed for the insolvent to be brought up, to all creditors whose debts amount to £5; and nothing can cure the want of that notice to the creditors. [*Parke, B.*—That is, to all persons who are inserted in the schedule as creditors to the amount of £5; but if, by mistake, the insolvent inserts a party as a creditor for less than £5, is he to be prejudiced by the want of notice to that creditor?] The creditor has no power of coming and setting the mistake right on the hearing, unless he have such notice. But further, this is not a case within the 93rd section. That applies only where, by mistake, the debt is specified in the schedule at an amount which *is not exactly* the actual amount; but the stating a debt of 7l. 18s. 8d. at an amount so much less than the actual amount as £3, is such “culpable negligence,” as takes the case out of the jurisdiction of that section. [*Parke, B.*—If so, ought there not to be a new trial? Because it was not left to the jury whether there had been culpable negligence, but only whether it was a case of fraud or of mistake. You say that the provisions of the 93rd section apply only where the mistake is to a slight amount; but that if it be so large as this, that section shews there is no protection at all.] Yes, for it can only arise from gross and culpable negligence.

F. V. Lee, contra.—The only matter in issue here is, whether the defendant was discharged under the act, as to the causes of action in the declaration mentioned; and there are authorities to shew, that a misdescription of the debt, or of the creditor in the schedule, which is not intended or calculated to mislead, is not sufficient to prevent the operation of the act: *Forman v. Drew (a)*, *Reeves v.*

1845.
HOYLES
v.
BLOOM.

(a) 4 B. & C. 15; 6 D. & R. 75.

1845.
 HOYLES
 v.
 BLOKE.

Lambert (a), Nias v. Nicholson (b), Boydell v. Champneys (c), Jervis v. Jones (d), Sharpe v. Gye (e). If there be any irregularity as to the notice to the creditors, they may apply to the Insolvent Debtors' Court to set aside the adjudication, but it cannot avoid the prisoner's discharge. [*Parke, B.*—The case resolves itself into a question of law, whether, where the difference in the amount of the actual debt, and of the sum stated in the schedule, is so great as this, the party is entitled to the benefit of the act at all. I take the question to have been left to the jury in the terms of the 93rd section.]

Cur. adv. vult.

PARKE, B., now delivered his judgment.—This case was argued before me, a few days ago, in the Exchequer Chamber, by Mr. *Valentine Lee* and Mr. *Thomas*. It was an action tried before Mr. *Kennedy*, as assessor to the sheriff of Middlesex. The defendant pleaded his discharge under the 1 & 2 Vict. c. 110. On the trial, it appeared that the defendant had been discharged, having described in his schedule, the debt as £3, which was really 7*l.* 18*s.* 8*d.*; and the creditor, the plaintiff, whose name was *Hoyles*, as Mrs. *Isles*. On the objection being taken, that the description, both of the creditor and of the amount of the debt, was wrong, and the defendant not entitled to his discharge, the learned assessor directed a verdict for the plaintiff; having first left to the jury the question, whether the description was fraudulently made, which the jury found in the negative, and then reserved to the defendant liberty to move to enter a verdict or a nonsuit.

I regret that I should have to decide the point raised in this case, as it is one of some novelty, and should have wished it to have been argued in the full court; but the

(a) 4 B. & C. 214.

(b) 2 C. & P. 120; Ry. & M.

322.

(c) 2 M. & W. 433.

(d) 4 Dowl. P. C. 610.

(e) 4 C. & P. 311.

sum in dispute is so small, that I am unwilling to put the parties to further expense.

Upon consideration of the clauses in the act, and the several decided cases on former insolvent acts, it appears to me that the learned assessor was right, and that the verdict ought not to be disturbed.

The description of the creditor, and of the amount of the debt, do not seem to stand entirely upon the same footing. With respect to the former, the question usually left to the jury has been, whether the description was made with intent to mislead, and would have the effect of misleading, the creditor who might look at the schedule. In similar cases, under 1 Geo. 4, c. 119, (*Forman v. Drew* (a), *Wood v. Jewett* (b)), this was done, and I believe commonly since. Whether, if the description, though not fraudulent, was such as was calculated to mislead, the defendant would be discharged, it is unnecessary to inquire, for my judgment does not proceed on any misdescription of the name.

With respect to the description of the amount of the debt, the 93rd section (which corresponds with the 63rd of the 7th of Geo. 4, c. 57), appears to me to explain the intention of the legislature. That section provides, that in cases where the amount specified *is not exactly the amount* of the true debt, the prisoner shall be entitled to the benefit of the act, where the mistake has been made without any culpable negligence, fraud, or evil intention. In *Frampton v. Champneys*, reported in 3 Jurist, 1170, the Court of Queen's Bench held, that the corresponding section of the 7 Geo. 4, c. 57, should be incorporated with the 40th, which directs the schedule to contain a true account; and consequently, if there be an error answering the description of error in the 93rd section, it will not affect the discharge, unless there be negligence, fraud, or evil inten-

1845.
HOYLES
v.
BLORE.

(a) 4 B. & C. 15.

(b) Id. 20.

1845.

HOYLES
v.
BLORE.

tion. But, if the sum specified, instead of *not being exactly* the true amount, is less than half that amount, or is much below £5, and the real debt above it, and the difference is so great that it removes the creditor from a class entitled to special notice to one not entitled, does the section apply? It seems to me that it does not; and that, if there is such an error in the description, which so materially alters the condition of the creditor, the statute does not permit the adjudication to operate as a discharge, even though there may have been no fraud, culpable negligence, or ill intention. To decide otherwise would be to deprive those words, descriptive of the degree of error, of all effect; and it must be presumed that the legislature inserted them advisedly, and did not mean to make all errors immaterial. What the precise limits of error are, beyond which the mistake shall be fatal, it may be difficult to define accurately: but there is no difficulty in saying, that, where the debt is by mistake removed from one class, for which a special notice is required to each creditor, to one in which it is not, the case is not within the protection of the schedule, and consequently, however innocently made, the defendant is not to be discharged.

Mr. *Kennedy* was therefore, I think, right in holding that, in this case, though there was no fraud, negligence, or ill intention (for those circumstances I must consider as having been found by the jury), the plaintiff was entitled to recover.

Rule discharged.

1845.

THE MAYOR, ALDERMEN, and BURGESSES of BRIDGEWATER
v. ALLEN.

June 20.

THIS was an issue, under the stat. 6 & 7 Will. 4, c. 71, s. 46, to try the existence of a modus in the parish of Bridgewater, in the county of Somerset. The first count of the declaration stated, that, in a certain discourse between the plaintiffs and the defendant, a question arose, whether from time whereof the memory of man was not to the contrary, there had been paid, within the parish of Bridgewater, and at the time of the commencement of the suit, to wit, on the 20th June, 1843, was payable, and of right ought to be paid, to the impropiator or other owners for the time being of the said parish, at Easter in every year, the modus or customary payment following, that is to say, in lieu of all tithes, except the tithe of pigs, yearly arising, growing, and increasing, in and upon lands in the occupation of any person *not inhabiting within the said parish*, which have not during the year been cropped with corn, grain, or flax, except certain lands within the parish called Great Castle Field, Little Castle Field, and St. John's Field, a modus or ancient customary payment of 1s. per acre, and so in proportion for any less quantity than an acre of such land; and in lieu of all the tithe, except the tithe of pigs, yearly arising, growing, and increasing, in and upon lands in the occupation of any one *inhabiting within the said parish*, which have not during the year been cropped with corn, grain, or flax, except certain lands within the said parish, called &c., the modus or ancient customary payment of 6d. for every acre, and so in proportion for any quantity less than an acre of such land. The plaintiffs denied the existence of such modus. In the second count the question raised was, whether a modus, similar to that set out in the first count, had not been paid for the last thirty years, which the plaintiffs de-

A modus, that in lieu of tithes arising out of lands in the occupation of any person *not inhabiting* within the parish, there should be a customary payment of 1s. per acre, and where the lands are in the occupation of a person *inhabiting* within the parish, there should be a like payment of 6d. per acre, is good.

1845.
 Mayor of
 BRIDGEWATER
 v.
 ALLEN.

nied. In the third count they denied the existence of the modus for sixty years. In the fourth count the plaintiffs affirmed, that a money payment, different in amount, quantity, or quality, from the said modus in the second count alleged, had taken place at some time prior to the said thirty years. In the fifth count the plaintiffs alleged, that the said payment or render of modus for thirty years was made, and enjoyment had, by a consent in writing. The sixth count contained the same allegation as to the claim of modus for sixty years. The defendant took issue upon all the above averments.

At the trial, before *Erle, J.*, at the last Spring Assizes for the county of Somerset, it appeared that the plaintiffs were the impropriate rectors of the parish of Bridgewater, and claimed all the tithes thereof, and that the defendant was the owner and occupier of land within the parish. Evidence having been given in support of the alleged modus, it was contended, on behalf of the plaintiffs, that such a modus was bad, and could not be sustained. The learned Judge reserved the point; and the jury having found a verdict for the defendant on all the issues, except the second and fourth, the learned Judge gave the plaintiffs leave to move to enter a verdict for them upon the first, third, fifth, and sixth issue.

Crowder having, in Easter Term last, obtained a rule accordingly,

Kinglake, Serjt., and *Greenwood* now shewed cause.— This is a good and valid modus. It is said to be bad for uncertainty; but, in order to render a modus bad for uncertainty, it must be shewn that it is uncertain, either as to the sum to be paid, the tithe in lieu of which it is paid, the persons who are to pay it, or the time of payment,— in all which respects this modus is clear and unequivocal. But it is said that, as there is a difference between the

payments to be made by the out-dwellers and in-dwellers, it never could have been a good and reasonable bargain. But, as in-dwellers are liable to perform duties within the parish, and to pay surplice fees and Easter offerings, to which out-dwellers would not be liable, it is not unreasonable to suppose that some former rector may have made a distinction between those two descriptions of person, as an inducement to individuals to reside within the parish. Besides, this is an agistment tithe; and the lands being valuable for pasture, the rector, in the case of out-dwellers, would lose the tithe of milk and wool arising from cows and sheep agisted in the parish, and taken to the homestead to be milked and sheared out of it. There are several authorities to shew that moduses payable by out-dwellers alone are good. *Chapman v. The Bishop of Lincoln* (a) is directly in point. There, a modus for persons residing out of the parish, but occupying lands within it, to pay 4*d.* an acre for the tithe of hay, and the herbage of pasture lands not ploughed or sown, was held good. So, in *Claxton v. Langton* (b), it was held that a custom, that out-dwellers occupying ancient pasture in a parish shall pay 4*d.* an acre early on the 1st of August, in lieu of tithes, was a good custom. So, a custom that persons occupying meadow or pasture land in the parish, but not residing in it, shall pay 0*d.* an acre yearly, in lieu of all tithes arising on such land, is good: *Samson v. Shaw* (c). And a custom for all occupiers of marsh, meadow, or pasture land, not living in the parish, to pay 12*d.* an acre for the tithe of sheep and cattle depastured, and for tithe hay, was held good in *Latcher v. Ridley* (d). The cases shew, that there is nothing inconsistent in the out-dwellers paying a different sum from the in-dwellers of a parish, and there can be nothing illegal in it. [*Parke, B.*—If you can assign any reason

1845.
 Mayor of
 BRIDGEWATER
 v.
 ALLEN.

(a) 2 Eagle & Y. Tithe Ca. 11;
 P. Wms. 565.
 (b) 1 Eagle & Y. 567.

(c) 2 Eagle & Y. 120.
 (d) 1 Eagle & Y. 506.

1845.
 Mayor of
 BRIDGEWATER
 v.
 ALLEN.

for a difference between the two, it is sufficient: we cannot enter into the reasonableness of it. *Alderson, B.* —We must assume that an actual bargain was made before the time of Richard the First.] If it were necessary to shew the reasonableness of this modus, it is perfectly reasonable here that the out-dwellers should pay a different sum from the in-dwellers.

Crowder and Elliott, in support of the rule.—This modus is unreasonable, and cannot be supported. No case is to be found of the same land paying a different sum as a modus, according to the residence of the parties holding or occupying the land at the time, whether they are in-dwellers or outdwellers. The payment is made in respect of the produce, not of the person. [*Parke, B.*—A clergyman might wish to have a greater number of persons paying Easter dues; and therefore might make a different bargain as to tithe with those residing within the parish, from what he did with those who resided out of it.] There is no case which shews, that he may take a different modus for the same land from different persons. A modus must not be variable in amount, but must be universally the same. [*Parke, B.*—Ycs, it must be the same under the same circumstances. *Rolfe, B.*—The rector's reason may have been, that the out-dwellers were more difficult to collect the tithe from, or to sue for them, than the in-dwellers.] He cannot by law give up half his tithe to secure the payment of the rest. A custom to pay money in lieu of tithes must be reasonable. In *Manby v. Taylor* (a), a modus of a sum of money in gross, payable to a vicar on his induction, with a further annual payment of a smaller sum, in lieu of certain tithes, was held bad. That was because it was an unreasonable payment. In *Bawdry v. Bushel* (b), a custom that all occupiers and tenants inhabiting out of a

(a) 2 Eagle & Y. 696.

(b) 1 Eagle & Y. 440.

will should pay 4*d.* an acre, in satisfaction of all tithes of land in it, was held unreasonable, and to be a *leaping* custom, not fixed to any certain person, nor to the land, nor of any permanence. [*Alderson*, B.—In *Chapman v. The Bishop of Lincoln*, *Fortescue*, J., says that that case is not to be relied upon.]

1845.
 Mayor of
 BRIDGEWATER
 v.
 ALLEN.

PARKE, B.—This rule must be discharged. We must, for the purposes of the present argument, assume that this *modus*, having existed in this form for the last sixty years, is evidence that the tithes of the parish were so paid ever since the first year of Richard I., that is to say, that this is an immemorial payment. Now, where an immemorial payment is proved in support of a customary *modus*, I apprehend it is not incumbent on the party setting up the *modus* to shew that it is a reasonable one; it must continue to be paid, unless shewn to be plainly unreasonable, which proof would come properly from the other side. The question before us, therefore, is, whether this *modus* is plainly unreasonable, on the ground that, according to the custom set up, different sums are payable for the same kind of land by different classes of persons, namely, in-dwellers and out-dwellers. It must be taken to have arisen from a bargain acted on ever since the reign of Richard I, and therefore we should even be astute to find plausible reasons to uphold it, and for this purpose to draw any distinction we can between the in-dwellers and out-dwellers of the parish. Now, supposing the law to be, as stated by the plaintiffs' counsel, that the in-dwelling farmer, who milks his cows or shears his sheep at his own house, would be liable under such a *modus* as this for tithes of milk and wool; while the out-dwelling farmer, who carries away to his homestead out of the parish the cows or sheep which he has agisted within it, would not be liable for tithes of those articles,—we have a reason for throwing a larger amount of payment on the latter than on the former. But

1845.
 Mayor of
 BRIDGEWATER
 v.
 ALLEN.

another good reason may be assigned to support this modus, namely, that the clergyman, who must be treated as a party to the contract, supposed to have been made previous to the first year of Richard I., gains by the in-dwellers much more than he does by the out-dwellers. The Easter offerings, surplice fees, and other profits which he receives from the farmer, constitute a large part of his revenue, and in some places are very considerable. Such are in the nature of personal tithes, although not tithes in the literal sense, so as to be covered by the modus, and seem a sufficient reason for making a bargain in favour of the in-dwellers; and we cannot go into the merits of that bargain. There seems to be no case exactly in point to the present, but the reasoning of the Judges in *Chapman v. The Bishop of Lincoln* strongly bears upon it; and, proceeding merely on principle, it seems to me that, if we can assign any reason for such an immemorial payment, we ought to suppose it, unless good reasons are shewn to the contrary. That is not the case here, and this modus must therefore be allowed.

ALDERSON, B.—I am of the same opinion. We must take it in this case, that a bargain was made before the first year of Richard I., and the question is, is that bargain an illegal one? I cannot find any reason to say so. In the case of a jumping modus, the bargain is illegal, because it is illegal against the subsequent rector; for the effect of it is that one rector gets one sum, another gets another, whereas each ought to get the same for the time he is in the parish; and that is the case here. Look also at what the Lord Chancellor says, in *Chapman v. The Bishop of Lincoln*: “Every modus supposes a composition, which, being lost, runs into a prescription. Suppose the composition had been for all occupiers, that would be good; and why should it make the custom unreasonable, to restrain it to those that live out of the parish? Does making the

composition with part only of the occupiers make it illegal? They might contract with whom and on what terms they pleased."

1845.
Mayor of
BRIDGEWATER
v.
ALLEN.

ROLFE, B.—I am of the same opinion, but do not think it necessary that we should find out a reason for this modus. We are bound to hold it good, unless the opposing party shews that it is not so. No man can tell at this distance of time what reasons may have existed in the time of Richard I. for entering into such a composition; and we must herefore see that there *could not* have been a reason for it, before we upset it.

Rule discharged.

BITTLESTON and Another, Assignees, &c., v. COOPER.

June 19.

ASSUMPSIT by the plaintiffs, as assignees of a bankrupt, for money had and received to the use of the plaintiffs as assignees, and on an account stated. Plea, non assumpsit. At the trial, before *Tindal*, C. J., at the last assizes at Warwick, it appeared that the action was brought to recover from the defendant the sum of £85, the proceeds of an execution against the bankrupt's goods, issued upon a judgment on a warrant of attorney, which had been given by the bankrupt to the defendant in the year 1836. It appeared that the warrant of attorney was not filed within twenty-one days after its execution, as required by the stat. 3 Geo. 4, c. 39, s. 1. It was, however, filed within a few weeks afterwards, and remained on the file until the month of January, 1843, when the execution

A warrant of attorney, which is not filed within the period prescribed by the 3 Geo. 4, c. 39, is void against the assignees in bankruptcy of the debtor, although judgment be signed and execution issued on it before the commission of the act of bankruptcy.

In such a case, the assignees may maintain money had and received against the execution

creditor, to whom the goods were assigned by the sheriff in specie, at an appraised value.

A judge's order for the admission of documents in evidence referred to a notice served by the defendant's attorney, dated 4th March, 1845. The notice produced was dated the 1st March; but the plaintiffs' attorney stated that it was the only notice served in the cause:—*Held* sufficient.

1845.
BITTLESTON
v.
COOPER.

was issued. The sheriff assigned the goods to the defendant, in part satisfaction of his debt, at an appraised value; but there was no actual *sale* of them. The debtor shortly afterwards committed an act of bankruptcy, on which a fiat issued against him, and the plaintiffs were duly appointed his assignees, and they claimed in this action to recover back the proceeds of the execution, on the ground that the warrant of attorney, not having been filed within the period prescribed by the 3 Geo. 4, c. 39, s. 2, was wholly void as against the plaintiffs as assignees, and the judgment and execution were therefore invalid. At the trial, the plaintiffs proved an examined copy of the warrant of attorney, and put in a judge's order for the admission of the execution of the original, which was described therein as "the document mentioned in a certain notice, served by the plaintiff's attorney or agent, dated the 4th day of March, 1845." The notice produced, however, was dated the 1st of March. It was contended for the defendant, that as the order did not appear to have been made upon the notice produced, it did not warrant the reading of the documents. The plaintiffs' attorney was called, and said that this was the only notice served in the cause; that it had been prepared in the country, sent up to London, and returned with the order annexed to it. The learned judge overruled the objection.

For the defendant it was contended, first, that as the warrant of attorney had been put in execution before the existence of the act of bankruptcy, it was not avoided by the statute; secondly, that the action for money had and received was not maintainable, the goods having been assigned by the sheriff to the defendant in specie, and not sold. In answer to the first objection, *Biffin v. Yorke* (a) was relied on. The Lord Chief Justice overruled the objections, and a verdict was found for the plaintiffs; but he

(a) 5 Man. & G. 428; 6 Scott, N. R. 666.

ved leave to the defendant to move to enter a verdict
im, or a nonsuit.

last Easter Term (April 22),

1845.
BITTLESTON
v.
COOPER.

It moved accordingly.—First, this warrant of attorney was not avoided by the stat. 3 Geo. 4, c. 89, s. 2, the bankruptcy being subsequent to the execution. The words of the statute are, “if, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued,” &c. then and in such case, unless the warrant of attorney, or copy of it, have been filed within the twenty-one days, the warrant of attorney, and the judgment and execution, shall be deemed fraudulent and void against the creditors under such commission. *Biffin v. Yorke* is undoubtedly an authority in favour of the construction contended for by the plaintiffs, but that case seems deserving of reconsideration. [*Pollock*, C. B.—That was the decision of a court of co-ordinate jurisdiction, which we ought to abide by, until overruled in a court of error.]

Secondly, this action for money had and received is not maintainable, the goods not having been sold, but merely referred to the defendant in specie, at an appraised value. In *Nightingale v. Devisme* (a), it was held that stock could not be sued for as money. In *Reed v. James* (b), which may be referred to as an authority against the defendant, the sale of stock was actually executed. [*Rolfe*, B.—This is a sale in effect; it only differs in this, that it does not purport to be in consideration of money paid, but states the actual fact. There was money paid in this case, just as much as in *Reed v. James*, and Lord *Ellenborough's* reasoning in that case applies just as much here as there. *Clark*, C. B., referred to *Powell v. Rees* (c).] There it

2 W. Bla. 684.

(b) 1 Stark. 134 ; 2 Rose, 654.

(c) 7 Ad. & Ell. 426 ; 2 N. & P. 571.

1845.
 BITTLESTON
 v.
 COOPER.

was a question of fact for the jury, whether the defendant had turned the goods into money or not; but here it was admitted that he had them in specie. [*Pollock, C. B.*—But he took them as so much money. How can you distinguish this case from *Reed v. James?*] That was the case of a sale; this of a valuation merely. [*Pollock, C. B.*—It is exactly the same in principle.]

Thirdly, the documents were not made admissible by the Judge's order, which varied from the notice. On this point alone a rule was granted, against which

Whitehurst and *Mellor* now shewed cause.—First, this variance between the order and the notice was perfectly immaterial. The defendants did not, in truth, want the notice to admit at all. The only use of it was to prove the execution of the warrant of attorney; but a warrant of attorney, as soon as it is filed, becomes a record; and the examined copy of it, together with the affidavit of the time of its execution, was sufficient evidence as against the defendant. Besides, every instrument is *prima facie* to be presumed to have been executed on the day it bears date. But the order was clearly admissible. There was but one notice in the cause, which was shewn to have been prepared in the country, sent to London, and returned with this order annexed. The defendant could not have been misled; and the order describes it as a notice served by the plaintiffs' attorney, who had served one only.—They cited *Field v. Flemming* (a).

Hill and *Waddington*, *contra*.—This was an order which operates only by consent, and only as to the documents specified in the notice to which it refers. The country attorney could not know what other notices might have been served in London between the agents. And the evi-

(a) 5 Dowl. P. C. 450.

dence was not unnecessary, because the plaintiffs had to prove, not only that the execution of the warrant of attorney was out of time, but that the party who signed it was the bankrupt, and not merely a man of the same name.

1845.
BITTLESTON
v.
COOPER.

ALDERSON, B.—I have no difficulty in this case. I think there is great doubt whether the production of the order was necessary to the plaintiff's case; but if it was, the evidence was amply sufficient. The defendant's attorney must have known what documents he meant to admit, and it was something like bad faith not to admit them, when offered in evidence at the trial. If there had been two notices, it might have been a reasonable ground for so acting; but it appears clear that there was but one. That being so, this was nothing more than *falsa demonstratio, quæ non nocet*.

ROLFE, B., concurred.

Rule discharged.

THOMPSON and Another v. DOMINY and Another.

June 20.

ASSUMPSIT.—The declaration alleged, that the defendants were the owners of the ship *Julia*, the master of which had shipped on board thereof, on account of one Grant, 1303 barrels of oats, to be carried by the defendants, and safely delivered to Grant or his assigns, he or they paying freight for the same; that the defendants signed a bill of lading to that effect, and delivered the same to Grant, and that Grant, for a certain sum, indorsed the bill of lading to the plaintiffs. And it alleged, that although the defendants had delivered part of the said goods to the plaintiffs, yet that they refused to deliver the residue thereof.

A bill of lading is not negotiable like a bill of exchange, so as to enable the indorsee to maintain an action upon it in his own name; the effect of the indorsement it being only to transfer the right of property in the goods, but not the contract itself.

1845.
 THOMPSON
 v.
 DOMINY.

The defendants pleaded non assumpsit, and other pleas, on which nothing now turned.

At the trial, before *Coleridge, J.*, at the last Spring Assizes at Winchester, it was objected for the defendants, that the plaintiffs ought to be nonsuited, on the ground that no action was maintainable by the mere indorsee of a bill of lading in his own name, the instrument not being negotiable. The learned Judge inclined to that opinion, but refused to nonsuit, and the jury having found a verdict for the plaintiffs, he reserved leave to the defendants to move to enter a nonsuit.

Kinglake, Serjt., having in Easter Term last obtained a rule accordingly,

Greenwood now shewed cause.—An indorsee of a bill of lading is entitled to maintain an action upon it, in the same way as the indorsee of a bill of exchange; for the latter instrument resembles the former in this respect, as is observed by *Ashurst, J.*, in *Lickbarrow v. Mason (a)*, where the learned judge says,—“The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange.” [*Parke, B.*—Yes; it is transferable from hand to hand, and it passes the property in the goods mentioned in it; but I never before heard of an action being brought upon it, and I think such an action quite untenable.] In *Waring v. Cox (b)*, an action of assumpsit was brought by the plaintiff, as indorsee of a bill of lading, for 30 casks of butter; but it failed, on the ground that the plaintiff had given no consideration for the indorsement, and therefore it did not transfer the property in the goods; but in the note of the reporter, it is intimated that an action may be maintained upon a nego-

(a) 2 T. R. 71.

(b) 1 Camp. 369.

le instrument, where the title to it is transferred by indorsement. [*Parke, B.*—I never heard of such an apt before. *Alderson, B.*—The decision in that case is not you. Lord *Ellenborough, C. J.*, there says,—“No has gone so far as to decide that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods *à facie* passes the property in them to the indorsee;” he concludes by saying, that “the action, if maintainable at all, should have been brought, not in the name of agent, but of the consignor himself.” *Parke, B.*—indorsement of a bill of lading for a valuable consideration transfers the property in the goods; but I never had occasion to see that the contract was transferred by it.] In *New v. Thornton (a)*, Lord *Ellenborough, C. J.*, says,—“I consider the indorsement of a bill of lading, apart from all else, as giving the indorsee an irrevocable, uncounterable right to receive the goods; that is, when it is not to be dealt with as an assignment of the property in the goods.” [*Parke, B.*—Yes; where it is an indorsement of value, it transfers the property in the goods; but a bill of exchange is very different; it is a continuing contract to a certain sum of money. By the law of England, a bill of exchange in action is not transferable: by the custom of merchants, it is transferable in one instance, that of a bill of lading; but there is no authority to shew that a bill of lading is transferable under such a custom, so as to enable a plaintiff to bring an action upon it.] In *Berkley v. Wat- (b)*, *Patteson, J.*, seems to intimate that such an action might be brought. He says,—“This is an action by the consignee of a bill of lading, not an indorsee. That makes no difference, though I recollect no instance of such an action being brought by an indorsee. If any such were brought, the plaintiff would have to state the original con-

1845.
 THOMPSON
 v.
 DOMINY.

(a) 6 East, 41.

(b) 7 Ad. & Ell. 39; 2 Nev. & P. 178.

1845.
 THOMPSON
 v.
 DOMINY.

tract and indorsement." And afterwards, in speaking of the bill of lading, he says,—“I should be sorry to destroy the negotiability of the instrument.” [*Alderson*, B.—*Patteson*, J., says, that he recollects no instance of an action having been brought by the indorsee; and yet how many thousands of cases of this nature have occurred in the city. *Parke*, B.—There is no custom of merchants that, by the indorsement of a bill of lading, the contract is transferred, so as to enable the indorsee to maintain an action upon it. If a fresh contract is made upon each indorsement, and successive losses take place as to the goods during the voyage, do you say that each assignee might maintain an action? If so, it might give rise to fifty different actions. *Alderson*, B.—If there is no authority for the maintenance of such an action as this, it is contrary to general principle that the contract is transferred. At the conclusion of the judgment in *Sanders v. Vanzeller* (a), the Court say that the contract is not transferred.] The reason why actions on the bill of lading have never been brought is accounted for by *Buller*, J., in delivering his judgment in *Lickbarrow v. Mason* (b). He says,—“No special action on the bill of lading has ever been brought; for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered.” The action was attempted in *Waring v. Cox*, but failed for the want of consideration. [*Alderson*, B.—The decision in that case is against you; but there is a note of the reporter something in your favour. The point was palpably before Lord *Tenterden* when he wrote his work on shipping; but he never alludes to the circumstance of an action being maintainable upon a bill of lading. He

(a) 4 Q. B. 297; 3 Gale & D. 580.

(b) 2 T. R. 75.

speaks of the property in the goods passing by the bill of lading; but he is silent as to the contract being transferable.] In *Sargent v. Morris* (a), it was held that an action against the shipowner for damage done to the goods, must be brought in the name of the consignor; but there the captain was, by the bill of lading, to deliver the goods for the consignor, and in his name, to the consignee, and at the time of the shipment the consignee had no property in the goods (b). As far as regards the convenience of merchants, it would be better to allow the assignee to bring the action in his own name; and what reason is there why it should not be brought? [Parke, B.—Because it was never brought before, and it is nowhere said that a contract is transferable; on the contrary, by the law of England, a chose in action is not transferable, and unless you can shew that there is any custom of merchants which makes the contract in a bill of lading transferable, it must be governed by that rule.]

1845.
 THOMPSON
 v.
 DOMINY.

Kinglake, Serjt., was stopped by the Court.

PARKE, B.—I never heard it argued that a contract was transferable, except by the law merchant, and there is nothing to shew that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods; it does not transfer the contract. That is the conclusion to be drawn from the judgment of *Tindal*, C. J., in delivering the opinion of the Court of Error in *Sanders v. Vanzeller* (c); and Lord *Ellenborough* appears clearly to have entertained the same view of the question.

(a) 3 B. & Ald. 277.

(b) Lord *Tenterden*, in giving his judgment that the action was not maintainable at the suit of the then plaintiff, says, "A transfer of

the property is very different from a transfer of the contract."

(c) 4 Q. B. 297; 3 Gale & D. 584.

1845.
 THOMPSON
 v.
 DOMINY.

ALDERSON, B.—I am of the same opinion. This is another instance of the confusion, as Lord *Ellenborough* in *Waring v. Cox* expresses it, which “has arisen from similitudinous reasoning upon this subject.” Because, in *Lickbarrow v. Mason*, a bill of lading was held to be *negotiable*, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word “negotiable” was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only.

ROLFE, B., concurred.

Rule absolute (a).

(a) The difference between the judgment of the Court in *Franklin v. Neate*, 13 M. & W. 485, 486. was incidentally discussed in the

June 21.

CHANTER v. JOHNSON and Another.

Semble, a license, under seal, to use a patented article, does not require a stamp.

ASSUMPSIT.—The declaration stated, that the defendants were indebted to the plaintiff in £33, for the license, consent, and permission of the plaintiff, granted to the defendants, to use upon the defendants' premises a Chant & Co.'s patent furnace, according to certain patent inventions whereof the plaintiff was then the owner and proprietor. The defendants pleaded non assumpsit and several other pleas, which it is not necessary to refer to. At the trial, before *Wightman, J.*, at the last assize at Liverpool, the plaintiff tendered in evidence the following license (given in pursuance of the defendant's order for a license *in writing*), which was under seal, but not stamped:—

" I, John Chanter, on behalf of myself and Company, Wine Office Court, Fleet Street, in the city of London, County of Middlesex, patentee and proprietor of the inventions known as Chanter and Company's, and other patents

improvements in furnaces, boilers, moveable fire-bars, condensers, &c., &c., by virtue of the King's letters patent, under the great seal of Great Britain, bearing date, &c., hereby, in consideration of the sum of £33, to be paid Messrs. Johnson & Co. (as by receipt hereunto annexed), give and grant to the said William Johnson & full and free license, consent, and permission to erect and use, upon or at the premises situate at Wood Street Hill, Wigan, but not elsewhere, say one patent furnace to thirty-horse steam boiler, one set of moveable bars of the same or similar construction with the said inventions referred to above, for which the said letters patent have been granted. As witness my hand, at London, this 19th day February, 1844.

" JOHN CHANTER (L. S.)."

" Registered, G. E. Stubbs."

It was objected for the defendant, that this document was a deed, and was inadmissible without a stamp: and the learned Judge, being of that opinion, rejected it. The defendants' counsel then contended, that as the plaintiff was bound by his contract to give the defendants a license in writing, and no such writing was in evidence, he must be nonsuited. The learned Judge, however, refused to grant nonsuit, on the plaintiff's counsel contending that a verbal license was sufficient, and referring to *Chanter v. Dewhurst* (a), but reserved leave to the defendant to move to set aside a nonsuit; and proof having been given of the supply of the furnace to and its use by the defendants, the plaintiff had a verdict, damages £33.

(a) 12 M. & W. 823.

1845.
CHANTER
v.
JOHNSON.

1845.
 CHANTER
 v.
 JOHNSON.

In Easter Term, *Martin* obtained a rule nisi to enter a nonsuit, or for a new trial, on the ground of misdirection; against which

C. Saunders and *Aspinall* (with whom was *Knowles*), now appeared to shew cause, but the Court called upon

Cowling (with whom was *Martin*), in support of the rule. The defendant was entitled to a nonsuit, upon the evidence given at the trial. His order to the plaintiff was for a license *in writing*; and inasmuch as the plaintiff, by reason of the document being unstamped, and therefore not receivable in evidence, was unable to prove the giving of a license in writing, in pursuance of the order, he was not entitled to recover. [*Parke*, B.— Does the Stamp Act require a stamp to such a document as this? Can it be considered as a *deed*, so that, if the licensee had been interrupted in the enjoyment of the license, he could have sued the plaintiff?] It is under seal, and appears to fall within the description of a “*deed not otherwise charged*,” within the meaning of the 55 Geo. 3, c. 189, sched., pt. 1, title “*Deed*.” At all events, this document having been rejected, the plaintiff proved no written notice, and consequently the defendants are at least entitled to a new trial. He then contended that the acts of the defendants did not amount to an acceptance of the license, and also said that he should contend that the license should be a deed, in order to be valid.—The Court then called on

C. Saunders and *Aspinall*, *contra*, who contended, first, that there was evidence to go to the jury of the defendant having waived the necessity of shewing a license in writing, and of their actual enjoyment of such a license as stated in the declaration; and secondly, that the document in question

t a deed, and did not require a stamp as such: as
 sh they cited *Taylor v. Waters* (a).

1845.

CHANTER
 v.
 JOHNSON.

KE, B.—The contract of the defendants was to pay
 intiff a certain sum for a license in writing, and I
 see any evidence of that contract having been waived
 red, and another substituted for it. But then the
 was rejected at the trial, for want of a stamp, and
 estion, therefore, arises whether any stamp was ne-
 r. The defendants say the instrument is a deed,
 ght to be stamped as such: but that is not so; it
 ot purport to be sealed and delivered as a deed; it
 resembles an award, or a warrant of a magistrate,
 though under seal, are not deeds. There seems to
 ie doubt whether leave was reserved to enter a ver-
 r the plaintiff, if the document was receivable in evi-

We will refer to my Brother *Wightman*.

a subsequent day (June 25),

KE, B., said, that they had ascertained from the
 d Judge that he had not reserved the point, and
 ore the rule would be absolute for a new trial.

Rule absolute accordingly.

(a) 7 Taunt. 374.

1845.

June 28.

TURNER v. LAMB.

Semble, in covenant for non-repair, the declaration ought to state the term for which the premises were demised.

THIS was an action of covenant by lessor against lessee, for not repairing. The declaration stated, that on &c., by a certain indenture, made between the plaintiff of the one part, and the defendant on the other part [profert], the plaintiff, for the considerations therein mentioned, did demise, lease, set, and to farm let to the defendant, his executors, &c., a certain messuage, tenement, and premises, with the appurtenances, more particularly mentioned and described in the said indenture. It then set out the covenant to repair, and assigned breaches thereon.

Special demurrer, assigning for cause, that the declaration omitted to state the term for which the premises were demised.—Joinder in demurrer.

Pearson, in support of the demurrer.—The declaration ought to shew the duration of the term demised. In an action for non-payment of rent, this may not be necessary; but in an action for non-repair it is; because the jury cannot otherwise properly assess the damages. The precedent given in the case of *Thursby v. Plant* (a) sets out both the term and the parcels. For the same reason, in a declaration against a sheriff for extortion in the execution of a fi. fa., the declaration ought to state the sum actually taken by him, and it is not sufficient to allege that he took a certain sum more than is allowed by the statute. *Ashb. v. Harris* (b). [*Parke*, B.—The question is, whether there is not a difference in the damages, if the lessee hold for one year or a thousand years: if there is, the declaration is not sufficiently certain. In *Vivian v. Campion* (c), which

(a) 1 Saund. 230 b.

(b) 2 M. & W. 673.

(c) 1 Salk. 141. In the report

of the same case in 2 Ld. Raym. 1125, the objection to the declaration is stated to have been, that the

was an action by the heir on the demise of his ancestor, the breach assigned was, that on the 1st of April, 3rd Anne, and for ten years before then, the premises were out of repair; and Lord Holt says,—“If the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir; the jury give as much in damages as will put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore ‘per decem annos’ was frivolous.”] The allegation that a lessor is possessed for the residue of a certain term of years is material and traversable: *Carvick v. Blgrave* (a).—He referred also to *Cooper v. Blick* (b) and *Ireland v. Johnson* (c).

1845.
TURNER
v.
LAMB.

Ogle, contra.—This declaration is in conformity with the precedent given by Mr. Chitty, and with the directions con-

breach was laid in part in the ancestor's time (the allegation being, that the ancestor died seised, and the reversion descended to the plaintiff, 15th December, 8 Will. 3, and that after the death of the ancestor, and after the descent of the reversion to the plaintiff, viz. 1st April, 3rd Anne, *et per decem annos tunc ultimo elapsos*, the defendant had permitted the premises to be out of repair); and so that the plaintiff had recovered damages for a breach in his ancestor's time, which was ill. Lord Holt said, “If the premises were out of repair in the ancestor's time, yet if the lessee suffers them to continue out of repair in the time of the heir, that is a damage to the heir, and he shall have an action . . . We always inquire in these cases,

what it will take to put the premises in repair, and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises. The breach is certainly and well enough assigned, by saying that *post mortem* of the ancestor, and the descent of the reversion to the plaintiff, viz., the first of April *tertio* of the Queen, the defendant permitted, &c., and the *decem annos*, being repugnant, are void. And as to the ten years being considered in the damages, *that cannot be*, for that matter is ordered as before.”

(a) 1 Brod. & B. 531; 4 Moore, 303.

(b) 2 Q. B. 915; 2 G. & D. 295.

(c) 1 Bing. N. C. 162; 4 M. & Scott, 706.

1845.
 TURNER
 v.
 LAMB.

tained in Mr. Serjeant Williams' note to *Thursby v. Plant*. It is clear that it is not necessary in all cases to state the length of the term. [*Parke, B.*—No; certainly not, except where the quantum of damage may depend on the length of the term. *Alderson, B.*—The damage by non-repair may surely be very different, if the reversion comes to the landlord in six months, or in nine hundred years. Lord *Holt's* doctrine would startle any man to whom the proposition was stated.] Suppose the declaration had alleged that the demise was for a certain term, to wit, twenty-one years, and the proof was of a demise for seven years, would that be a variance? [*Alderson, B.*—That is the whole question: if the allegation is material, there would be a variance. *Parke, B.*—Surely the jury ought to see on the face of the record what it is they are to give damages for. If the passage I have cited from Lord *Holt's* judgment be correct, it seems to shew that the damages must be the same in all cases; but surely there must be some difference between a term of one year and twenty years, or between an estate for life and an estate for years—I do not give any decided judgment on the case, but the point seems to be worthy of consideration. Both parties had better amend.]

Ogle thereupon agreed to amend, by stating the term and *Pearson* consented to withdraw the demurrer, and plead to the declaration so amended.

1845.

PENNELL and Others, Assignees of SPENCER, a Bankrupt,
v. ASTON and Another.

June 25.

ASSUMPSIT for money had and received by the defendants to the use of the plaintiffs, as assignees of J. R. Spencer, a bankrupt. The defendants pleaded non assumpsit and other pleas.

At the trial, before *Platt*, B., at the sittings in last Easter term, it appeared that the defendants, for a long time prior to the bankruptcy of Spencer, which took place on the 17th of April, 1848, had acted as his solicitors, and that he had become indebted to them in a large sum of money. On the 14th and 27th of March prior to the bankruptcy, they received from certain parties, who were agents and salesmen to the bankrupt, two sums of money, the produce of a sale by the bankrupt of all his stock in trade as a tanner. These sums, which exceeded the amount of the bankrupt's debt to the defendants, were applied by them in discharge of certain monies due from the bankrupt to them, and also in satisfaction of three bills of costs, amounting on the whole to 274*l.* 11*s.* 3*d.*, and they accounted to the assignees for the surplus. This action was brought to recover the above sum of 274*l.* 11*s.* 3*d.* Some evidence was given on behalf of the plaintiffs, to shew that the bankrupt's affairs were in an insolvent state at the time of the money being paid to the defendants, and that the defendants were aware of his insolvency. Under these circumstances, the learned Judge told the jury, that if the plaintiffs had proved to their satisfaction that the defendants, before the bankruptcy, actually received the money to the use of the bankrupt, they in that case would hold

S. being indebted to the defendants, who had acted as his solicitors, in a large sum of money, they, before his bankruptcy, received certain sums belonging to S. from his agent, and applied them in discharge of their claims upon him. S. having afterwards become bankrupt, and his assignees having brought an action against the defendants to recover this money as money had and received to their use as assignees, the learned judge told the jury that, if the defendants before the bankruptcy actually received the money to the use of the bankrupt, they held it after the bankruptcy to the use of the assignees, who were entitled to succeed on the issue of non assumpsit:

—*Held*, that *clear* that the jury was a misdirection, and that there ought to be a new trial, unless it was *clear* that the jury was not misled, and that it was afterwards explained away.

1845.
 PENNELL
 v.
 ASTON.

the money after the bankruptcy to the use of the assignees, and the plaintiffs were entitled to succeed on the issue of non assumpserunt. The jury having, under this direction, found a verdict for the plaintiffs, *Humfrey*, in Easter Term last, obtained a rule for a new trial, on the ground of misdirection; against which

Crowder and *Ball* now shewed cause.—The learned Judge's direction was correct. The money was paid in the ordinary course of business, and being received by the defendants to the use of the bankrupt, would become the money of the assignees from the time of the bankruptcy, and the plaintiffs are, therefore, entitled to recover. [*Parke*, B.—It is not enough that the bankrupt should be in insolvent circumstances, but there must be a preference of one creditor over the other. The burden of proof was upon you to shew that a particular sum of money was given in fraudulent preference of the other creditors.] The learned Judge did not by his direction cast upon the defendants the burthen of proving that there was not a fraudulent preference. The case resolved itself into a question whether the money was received by way of fraudulent preference, and that has been determined by the jury.

Humfrey and *Rowe*, in support of the rule.—By the learned Judge's direction, the burthen of proof was improperly cast upon the defendants instead of the plaintiffs. The money having been received by the defendants *before* the bankruptcy, it did not belong to the assignees, unless it was received by way of fraudulent preference; but the learned judge's direction would leave the jury to suppose that it would *primâ facie* belong to the assignees, if it were received before the bankruptcy; but that is not so.

PARKE, B.—I am of opinion that the rule ought to be

made absolute for a new trial, on the ground that the effect of the learned judge's direction was to throw the burthen of proof upon the wrong party. If the money was originally received to the use of the bankrupt before the bankruptcy, the assignees ought to have sued for money had and received to the use of the bankrupt. But here there is no count upon such a cause of action. The assignees could not sue for the money as had and received to their use, unless it was received by the defendants after the bankruptcy, or unless it was received before the bankruptcy by way of fraudulent preference, for then it would not be paid to the use of the bankrupt. It was a misdirection to tell the jury, that if the money was in the hands of the defendants at the time of the bankruptcy, it would become money had and received to the use of the assignees. That is not so. The jury may have thought that it was for the defendants to discharge themselves from their liability, upon proof of the money having been received by them before the bankruptcy. It may have been afterwards set right; but wherever there has been a misdirection, there ought to be a new trial, unless it is *clear* that the jury were not misled, and that the misdirection was afterwards explained away.

1845.
PENNELL
v.
ASTON.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

1845.

June 25.

J. M., by indenture, assigned to the plaintiff a ninth part of his share in the residue of the estate of T. H., deceased. By an order of 29 July, 1842, made in a suit in Chancery, of "*Powell v. Norwood*," the Vice-Chancellor ordered the defendants in that suit to retain £250, being part of the produce of J. M.'s share of the residuary estate of T. H., to be paid to such person as the present defendant and J. M. should jointly direct. It was afterwards agreed between the parties, that £50, to be considered as part of the sum of £250, should be paid by the defendant to the solicitors for J. M. and the plaintiff. An action having been brought to recover this sum of £50, the plaintiff tendered in evidence the following document:—"To the executors of T. H., deceased *Powell v. Norwood*. Gentlemen,—We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of £250, being the amount directed by the order of the 29th of July last, to be paid to our order. We are, gentlemen, your very obedient servants, J. M., Dec. 16th, 1842." This document was signed by J. M. only, and was unstamped:—*Held*, (*Rolfe*, B., dissentiente), that it was not a bill of exchange, and that it was admissible in evidence without a stamp.

RUSSELL v. POWELL.

ASSUMPSIT.—The declaration stated, that on the 20th of May, 1839, by a certain indenture then made &c., one John Mynn assigned to the plaintiff a ninth part of his share of the residue of the estate of one Thomas Harrison, deceased; that by a certain order of the 29th of July, 1842, made in a suit in Chancery for the administration of the estate of the said T. Harrison, deceased, it was ordered by the Vice-Chancellor that the defendants in that suit should retain £250, being part of the produce of the said share of the said J. Mynn of the residuary estate of the said T. Harrison, deceased, to be paid to such person or persons as the now defendant and the said John Mynn should jointly direct; that afterwards, to wit, on the 13th of December, 1842, a certain agreement was entered into between the plaintiff and the defendant, which was entitled "In Chancery, *Powell v. Norwood*," by which it was agreed that the said sum of £250, so directed by the order of the 29th of July to be paid to the joint order of the said J. Mynn and the now defendant, should be paid to and received by the now defendant, and that the sum of £50, to be considered as part of the said £250, should be, immediately upon handing over the said joint order signed by the said J. Mynn, paid by the said defendant to Messrs. Miller & Carr, the solicitors for the said J. Mynn and the now plaintiff; and that £50, other part thereof, should be paid to them as soon as the order should be obtained for a division of the funds in Court; and that in consideration thereof

the defendant should execute an assignment to the now plaintiff of all his, the defendant's, claim under certain securities therein mentioned. And after alleging mutual promises to perform the agreement, the declaration further averred, that the defendant afterwards, to wit, on the 29th of December, 1842, in pursuance of the arrangement, received the said sum of £250, and that the plaintiff, in pursuance of the agreement, and in order to enable the defendant to recover and obtain payment of the said sum of £250, caused and procured the said J. Mynn to sign a certain order and authority, addressed to the executors of the said T. Harrison, deceased, for the payment of the said sum of £250 to the now defendant, or to his order, and in such form that the same might afterwards be signed by the now defendant, and then caused the same to be delivered to the now defendant, so that the now defendant might also sign his name thereto, and by means thereof obtained payment of the said sum of £250, and which was in part so received by him as aforesaid. And the plaintiff further averred, that he had always, from the making of the agreement, ceased to claim the said £250, and in all things performed the agreement on his part. The declaration then averred, that on the 26th of July, 1843, the Vice-Chancellor made an order in the said suit for a division of the funds in Court in the same suit; and although, immediately upon the handing over of the said order, signed by the said J. Mynn as aforesaid, to wit, on &c., the said first mentioned sum of £50, as part of the said £250, was paid by the defendant to the said Messrs. Miller & Carr, according to the defendant's promise in that behalf, and although afterwards, to wit, on the 26th of July, 1843, the defendant executed an assignment to the plaintiff of all his, the defendant's, interest and claim in and relative to his said securities, and although a reasonable time for payment by the defendant of the said sum of £50 secondly above mentioned, had elapsed after

1845.
RUSSELL
v.
POWELL.

1845.
 {
 RUSSELL
 v.
 POWELL.

the defendant had notice of the obtaining and making of the last-mentioned order of the Vice-Chancellor, and although the defendant, within such reasonable time, to wit, on &c., was requested by the plaintiff to pay the said last-mentioned sum of £50 according to the agreement; and although the said Messrs. Miller & Carr and the plaintiff and the said John Mynn respectively have always been ready and willing that the said sum should be paid according to the agreement, and were respectively willing to receive the same, as the defendant always well knew: yet &c.—Breach, in non-payment of the said last-mentioned sum of £50 to Messrs. Miller & Carr, or the plaintiff, or the said J. Mynn, or either of them.

The defendant pleaded, thirdly, that the plaintiff did not cause or procure the said John Mynn to sign, nor did the plaintiff cause to be delivered to the defendant, the said order and authority addressed to the executors of the said Thomas Harrison, deceased, for payment to the said defendant or his order of the said sum of £250, modo *et* formâ.

At the trial, before *Alderson*, B., at the Middlesex Sittings after Easter Term, it appeared that one John Mynn had assigned to the plaintiff his share in the residue of the estate of one Thomas Harrison, deceased; and that, by an order of the 29th of July, 1842, made in a Chancery suit of *Powell v. Norwood*, the Vice-Chancellor ordered the defendants in that suit to retain £250, being John Mynn's share of the estate of Thomas Harrison, to be paid to such person as the present defendant and John Mynn should jointly direct. It was afterwards agreed between the plaintiff and the defendant, that £50, being part of this sum, should be paid by the defendant to the plaintiff, and the present action was brought for the recovery of this sum. For the purpose of proving the issue raised by the third plea, the plaintiff tendered in evidence the following document:—

"To the Executors of the late Thomas Harrison,
deceased.

"*Powell v. Norwood.*

"We do hereby authorize and require you to pay to Mr.
George Powell, or his order, the sum of £250, being the
amount directed by the order of the 29th of July last, to
be paid to our order.

"We are, Gentlemen,

"Your very obedient servants,

"JOHN MYNN.

"Dec. 16, 1842."

1845.
RUSSELL
v.
POWELL.

This document was objected to on the part of the defend-
ant, on the ground that it was a bill of exchange, and
could not be received in evidence for want of a stamp.
The learned Judge received the evidence, and the jury
having found a verdict for the plaintiff, damages £50, he
gave the defendant leave to move to enter a verdict for
him.

Knowles having, in Trinity Term last, obtained a rule
accordingly,

Jervis and *Bovill* now shewed cause.—First, the instru-
ment in question is not an order for the payment of
money. The money was to be paid out of Chancery, and
this is nothing more than a joint direction and appoint-
ment to whom the money was to be paid, signed by one
party only, and not by the defendant. It was, therefore,
an incomplete document. To constitute it an order for the
payment of money, in any respect valid, it ought to be a
perfect instrument, and to have been signed by the de-
fendant as well as Mynn; because the money is to be paid
by the joint direction of both parties. But, in truth, it is
not this paper which is the operative instrument. It is the
order of the Court of Chancery alone which has any real

1845.
 {
 RUSSELL
 v.
 POWELL.

operation. Supposing the parties to whom it is directed had refused to pay the money, no action could have been maintained upon it; but the parties must have gone to the Court of Chancery to get the order enforced. Secondly, it is not a bill of exchange, and the making it payable to order does not make it transferable. It is intitled in the cause, and directed to the parties in the cause, and is nothing more than a proceeding to get the money out of court. The making it payable to Powell or his order will not of itself make it a negotiable instrument. It is, in legal operation, merely an authority to the parties to pay in pursuance of the order of the Vice-Chancellor, and the Stamp Act has no application whatever to such a document. It refers to the order of the 29th of July, and in effect incorporates it in it. As between these parties it is as imperfect a document as an escrow. If it was a document which ought to have been stamped at the time it was handed over, that objection was not taken at the trial. There is nothing in the agreement to shew that a *stamped* document was to be delivered; it is simply that the defendant was to hand over an instrument signed by John Mynn. If the plaintiff were setting up this as a draft or order for the payment of money, it might be another thing. It cannot be said that this is an order for the payment of money out of a particular fund. [*Alderson, B.*—I should be sorry if a Judge's order for the payment of money should be liable to a stamp, which it would be if this were held to be so.] This is merely a consent that Powell shall receive the money, but it has no validity without reference to the order of the Court of Chancery; that order required the money to be paid to such person as the defendant and John Mynn should jointly direct: but here they never get to that joint direction, for the document is not signed by both; therefore it is an instrument wholly incomplete. The calling it an order for the payment of money is nothing.

Badeley (*Knowles* with him), in support of the rule.— It is said this is not an order to pay money; but the plaintiff has called it an order and authority for the payment of the sum of £250, and he has undertaken to hand over an order in due form, but he has not done so. If this be not an order for the payment of the £250, then the issue is not proved. If the plaintiff had not a complete order, he should have made an excuse; but he has gone to trial upon an issue taken on an allegation that he delivered the order; and he was bound to prove that he delivered a complete order, properly stamped. Admitting, however, that this is an imperfect instrument, it may still require a stamp; for, although not complete as to the other party who ought to have signed it, it is still binding on the party who did sign it. In *Chitty on Bills* (a), it is said, "Although the instrument referred to may be thus inoperative as a bill or note, yet if for the payment of money, they are nevertheless, by the terms of the Stamp Act, liable to the stamp duties as valid bills or notes are." So that, taking this to be an imperfect instrument, it ought to have been stamped, and if not, it is not available at all. But this is a bill of exchange. According to Mr. Justice *Bayley's* definition (b), "a bill of exchange is a written order or request for the payment of money absolutely and at all events." This document comes within that definition. It is an order upon the executors to pay to Mr. George Powell, or his order, the sum of £250; and it is negotiable upon his giving his order. With respect to the concluding words, "being the amount directed by the order of the 29th of July last to be paid to our order," they will not prevent its being a bill of exchange, and are merely a description of the fund out of which the amount was to be paid under the order. In *Haussoullier v. Hartstick* (c), it was held that a note by which A. promised to

1845.

RUSSELL
v.
POWELL.

(a) 9th edit. p. 145.

(b) Bay. on Bills, p. 1.

(c) 7 T. R. 733.

1845.
 }
 RUSSELL
 v.
 POWELL.

pay the bearer £50, "being the portion of value as under deposited in security for the payment hereof," might be declared on as a promissory note; and in *Burchell v. Slocock* (a), a written promise for the payment of money to J. S., or order, for value received of the premises in Rosemary-lane, was held to be a negotiable note. In *Chitty on Bills* (b), it is said, "the statement of a particular fund in a bill of exchange will not vitiate it, if it be inserted merely as a direction to the drawee how to reimburse himself;" and the two last-named cases are cited as authorities. Then it is said that this is an order in the cause; but it is not so. The Vice-Chancellor's order gives the parties power to draw upon the executors for the payment of the money, and there is no reason why they should not do it by a bill of exchange. The parties have here given an order that the money should be paid to a particular person. The instrument, when drawn, is the act of the parties, but the form of it is left to their discretion, and they may therefore draw it in any form they please. It in no way interferes with the order of the Court of Chancery. If the parties who are to have the disposal of the money do it in a particular form, which requires a stamp, it is not for them to say that it is not a valid instrument.

PARKE, B.—I think this rule ought to be discharged. I do not say what my opinion would have been, if this instrument had got into the hands of a third party for value. I am disposed, however, to think there may be cases in which this instrument would require a stamp. In this case, the issue does not make it important to prove a regular order, for an incomplete one will suffice. The averment in the declaration shews this. In the state in which this instrument was tendered, I think it was not a bill of exchange. I do not say that, if the parties making this

(a) 2 Ld. Raym. 1554.

(b) 9th edit. 139.

instrument had allowed Powell to indorse it over for value, they would not have been liable upon it. It might also be objected, that the defendant was not bound to sign any but a stamped instrument, lest he should be subjected to a penalty, but that objection was not taken, and, if taken, a waiver might have been shewn. Another objection might have been made, that the instrument was not to have any operation until it was signed by both. Until that was done, it was nothing but an incomplete document. On the whole, I think that this instrument was properly received in evidence without a stamp.

1845.
 RUSSELL
 v.
 POWELL.

ALDERSON, B.—I am of the same opinion. I think this is a mere warrant for the payment of money under the order of the Court of Chancery.

ROLFE, B.—I regret that I have formed a different opinion from the rest of the Court. The money in this case was "to be paid to such person as the defendant and John Mynn should jointly direct." Now, if Powell and Mynn had merely asked the executors to pay the amount, that request would not have required a stamp, as it would not have been an order delivered to the payee. But here are parties upon whom a bill of exchange might be drawn, and here are competent parties to draw it upon them; and the question is, whether the document is not a bill of exchange. It seems to me to have all the characteristics of a bill of exchange. The words "*Powell v. Norwood*" are mere surplusage, and do not affect this question. It is not signed by Powell, but that is immaterial, as he is to have the money. I think it is an order to the executors in the shape of a bill of exchange. True, it turns out to be an imperfect instrument, but that is not important, as it does not appear on the face of it what parties are to sign it. I think, on the whole, that it is a bill of exchange, and therefore was not receivable in evidence; but I am

1845.
 RUSSELL
 v.
 POWELL.

not sorry I am overruled by the rest of the Court, as substantial justice will be done by the decision of the Court to the contrary.

PLATT, B.—I agree with my Brother *Parke*, that the instrument in question was properly received in evidence without a stamp. It was not complete; it was merely inchoate; and until it has all the characteristics required by the act of Parliament, no stamp is necessary. The law ought to be clear that a stamp is requisite, before such a burthen is imposed upon the subject. I even go farther than my Brother *Parke*, for I think that the instrument was merely a carrying out of the order of the Vice-Chancellor, and not an order capable of compelling payment. It is not like the case of a merchant abroad, who, having funds in this country in his correspondent's hands, can compel that correspondent to pay out of those funds. Here, the executors are only bound to pay the money where they have the *joint* direction of Powell and Mynne for that purpose. I was struck with Mr. *Bovill's* argument, that the money was to be retained by the executors subject to the joint direction of the parties. I think this is merely an instrument made in pursuance of the Vice-Chancellor's order, and therefore that it does not require a stamp. Suppose a Judge's order is made for money to be paid by consent of the defendant's attorney, and that consent is given, such an order is not liable to stamp duty. The case is the same here: the document merely carries out the order of the Vice-Chancellor.

Rule discharged.

1845.

MOON v. ROBINSON.

June 25.

THIS cause was tried on the 18th of April, in Easter Term, which commenced on the 15th. The *distringas* was returnable on the 23rd of April; and on the 26th *Jervis* obtained a rule to shew cause why the judgment should not be arrested. Against this rule

A cause was tried on the 18th of April, in Easter Term, which commenced on the 15th; the *distringas* was returnable on the 23rd, and a motion in arrest of judgment was made on the 26th:—*Held*, that the motion was too late within R. G. H. T., 2 Will. 4, s. 65, it not having been made within four days from the day of trial.

Humfrey now shewed cause.—This motion for a rule to arrest the judgment was made too late. The case comes within the General Rule of Hilary Term, 2 Will. 4, pl. 65, which provides that “no motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the day of *trial*, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.” In this case, the cause having been tried in the beginning of Easter Term, the time of the return of the *distringas* is immaterial; and the only question is, whether four days had elapsed from the day of trial before the motion was made. *Thomas v. Jones* (a) is directly in point. *Parke*, B., there says, “I think the new rule applies to all cases, and means that the motion must be made within the four days of term which next occur after the trial.” The old practice has been altered by the new rule.—He referred to Archbold’s Practice, 1108, “Arrest of Judgment.”

Jervis, in support of the rule.—The motion was not too late. The words “four days from the time of the trial” mean four days from the return of the *distringas*. In *Cheetham v. Sturtevant* (b), where the second sittings in Hilary Term commenced on the 19th of January, the *distringas* was returnable on the 20th, and the cause was tried by adjournment of the sittings on the 22nd, it was

(a) 4 M. & W. 31.

(b) 12 M. & W. 515.

1845.
MOON
v.
ROBINSON.

held that the cause was properly tried, as causes tried at the adjournment of a sittings are to be considered as tried on the first day of the sittings. The principle of that case is applicable here. The time runs from the return day of the distringas, when the cause must be considered as being tried, and the Court can know nothing of it before.

PER CURIAM.—The motion was too late. It is impossible to get over the express words of the rule, which says that no motion shall be allowed “after the expiration of four days from the day of trial, if there are so many days in term.” The new rule alters the old law.

Rule discharged.

June 27.

PALMER v. EARITH.

A sewers' rate, not being imposed directly by act of Parliament, is not a “parliamentary tax.”

TRESPASS for breaking and entering the plaintiff's house and shop, and seizing his goods.

Plea, not guilty, by statute.

At the trial, before *Rolfe*, B., at the Middlesex sittings in Hilary Term last, a verdict was found for the plaintiff, damages 15*s.*, subject to a special case, which stated the following facts:—The plaintiff, in 1843, became tenant to the defendant of a house in Goswell-street, situate within the limits of the commissioners of sewers for the Holborn and Finsbury district, under an agreement which contained the following stipulation:—“All taxes, parochial and parliamentary, to be paid by the said tenant.” The plaintiff, during his tenancy, was assessed to the sewers-rate in the sum of 15*s.*, which he paid in December 1844; after which, on the defendant demanding his rent, due at the previous Michaelmas, the plaintiff tendered the same, deducting the 15*s.* for sewers-rate. The defendant refused the amount tendered, and distrained upon the plaintiff's goods, whereupon the present action was brought. The

question for the opinion of the Court was, whether the plaintiff was entitled to deduct the sewers-rate from the defendant's rent.

1845.
PALMER
v.
EARLTH.

Peacock, for the plaintiff.—A sewers-rate, not being a tax imposed directly by act of Parliament, is not a parliamentary tax, and is therefore not a tax, within the stipulation in this agreement, to be paid by the tenant. In *Newster v. Kitchel* (a), it is stated, that, in the debate of that case, it was laid down by *Holt*, C. J., "that the word *rates*, generally spoken with reference to a freehold, or where the subject-matter will bear it, shall be intended of parliamentary taxes propter excellentiam. But there be other taxes not parliamentary, as repair of churches, commission of sewers." That shews that a tax imposed by commissioners of sewers is not a parliamentary tax. It is imposed by them under a power to make a rate; and in this respect it is like a paving-rate. In *Waller v. Andrews* (b), where, by the agreement, the tenant was to pay 'all outgoings whatsoever, rates, taxes, *scots*, &c., whether parochial or parliamentary," it was held, that an extraordinary assessment, made by commissioners of sewers upon the lands, was within the agreement; but that was on the ground of its being a *scot*, and not a parliamentary tax. *Arke*, B.—Yes; and in that case there were the other words in the agreement, "all outgoings whatsoever." *Alston*, B.—Is a poor-rate a parliamentary tax? It is comprehended not. In *Baker v. Greenhill* (c), a landowner, jointly with others to repair a bridge, *ratione tenuræ*, deeded the land, and the lessee covenanted to pay the rent clear of the land-tax and all other taxes and deductions whatever, either parliamentary or parochial, taxed or imposed upon the premises, or upon the lessor in re-

(a) 2 Salk. 616.

(c) 3 Q. B. 148; 2 G. & D.

(b) 3 M. & W. 312.

435.

1845.
PALMER
v.
EARLTH.

spect thereof, the landlord's property-tax only excepted; and by stat. 25 Geo. 3, c. 124, reciting the liability to repair *ratione tenuræ*, it was enacted, that the landowners, liable as above, should repair and keep in repair the bridge during the continuance of the act, and on their default road trustees were empowered to do the repairs and recover against the owners; and for raising the sums required, power was given to the landowners to call meetings and to make rates according to the value of the chargeable lands, such rates to be levied, if necessary, by distress: it was held, that the original liability for contributions to repairs did not, by these enactments, become a parliamentary tax or deduction within the lessee's covenant, and that he, having been compelled to pay a rate made and charged upon him as lessee and occupier, might (in the manner pointed out by the statute) recover the amount from the lessor. There, although it was clear the rate could not have been made except by virtue of the act, yet it was held that it was not a parliamentary tax, and that the lessee was not liable to pay it. [*Alderson*, B.—A county rate is not a parliamentary tax, although it is, in one sense, made by Parliament; but the rate is not fixed or assessed by act of Parliament.] A sewers-rate is not imposed directly by act of Parliament, in the same manner that the income and window taxes are imposed; the amount of which is fixed by the act. In the case of a sewers-rate, it is not a tax when the act is made. [He was then stopped by the Court.]

Barstow, for the defendant.—The question here is as to the meaning of the parties to this particular agreement, taking into consideration the local liabilities of the parties. If the landlord be held chargeable, it will be in consequence of the parties putting in a redundancy of words. If the parties had used the term "all taxes" only, and the word "parliamentary" had been excluded, it is clear this rate would have fallen on the tenant. But the word *parlia-*

statary means only a tax imposed by authority of Parliament. [Alderson, B.—According to that view, a poor-rate would be a parliamentary tax, and would fall on the land-*d.*] A sewers-rate is by the acts made payable by the tenant; and in *Callis on Sewers*, a sewers-rate is stated to be a tax which, in the first instance, is chargeable on the tenant. The cases as to the land-tax are applicable to the present case. In *Amfield v. White* (a), where a tenant verbally agreed to pay “all taxes,” it was held, that, under that agreement, he was bound to pay the land-tax, though it was not specifically mentioned. And in *The Governors of Christ’s Hospital v. Harrild* (b), where the lessee covenanted “at his own charge, to pay all parliamentary, parochial, and other taxes, tithes, and assessments then or thereafter to be issuing out of all or any of the premises thereby demised premises, or chargeable upon the lands or tenants thereof for the time being in respect thereof,” it was held, that land-tax, which had been redeemed or purchased by a former lessee of part of the premises, under the provisions of 42 Geo. 3, c. 116, was a parliamentary assessment within the meaning of the covenant. Parke, B.—There is a provision in the Land-Tax Acts, that if the tax is redeemed, the party redeeming shall have a remedy against the tenant; so that the tenant is to pay the tax at all events.]

PARKE, B.—It is quite clear, on the authority of Lord *Alton* in *Brewster v. Kitchel*, that sewers-rates are not to be considered as *parliamentary* taxes. A parliamentary tax is one that is imposed directly by act of Parliament. The case of *Waller v. Andrews* is distinguishable from the present, as there the tenant agreed to pay “all outgoings whatsoever;” but here the words are much less extensive. The tenant was under no obligation to pay the whole rent

1845.
PALMER
v.
EARLTH.

Ry. & Mo. 246.

(b) 3 Scott, N. R., 126; 2 Man. & Gr. 707.

1845.
PALMER
v.
EARITH.

without deduction, and at the time of distress he t
enough.

ALDERSON, B., ROLFE, B., and PLATT, B., concu
Judgment for the ;

June 19.

IRELAND v. HARRIS.

The plaintiff, a schoolmaster, in 1842, contracted with the defendant to rent of him a house and school-room, at the rent of £35 a year ; and it was further agreed between them, that, " unless death or continued ill-health in either case should take place," the defendant promised to provide two bed-rooms over the intended school-room, but not before the year 1844 ; and when such rooms should be provided, the plaintiff agreed to pay for them an additional rent of £5 a year. In an action on this agreement, the declaration alleged as a breach, that, although the whole of

ASSUMPSIT.—The declaration stated, that, the and before the commencement of the suit, to wit 30th day of November, A. D. 1842, by a certain ag in writing, then made and entered into between fendant of the first part, and the plaintiff of the part, the defendant agreed to let to the plaintiff, plaintiff agreed to rent of the defendant, and o certain house and school-room, situate in Mewlan parish of St. Sepulchre, in the county of Northan £35 per annum, the rent to be paid quarterly, com from the 25th day of December, A. D. 1842, on ditions of all inside work to be done by the said if he should require any ; no fixtures to be remove any part of the premises should be damaged or def same should bemade good by the said plaintiff : as was by the said agreement then mutually agre the said house and premises should be held for thr on conditions of the rent being promptly paid, at 1 quarter-days, namely, on the 25th day of Decen 25th day of March, the 25th day of June, and day of September ; that, if the house and premis be underlet, it was not to be without a written from the defendant, his heirs or assigns ; and t party should be entitled to six months' notice

the year 1844, except a few days, had elapsed, and although *the defendant* had n vented by any ill-health, he had not, although often requested, provided the two be *Held*, on motion in arrest of judgment, after verdict for the plaintiff, that the " or health in either case " meant ill-health of either of the parties, and therefore that the was bad, for not averring that there had been no continued ill-health on the part of t

should be given in writing, previous to the expiration of that agreement, which would end on the 25th day of December, A. D. 1845; and until that time that agreement should be in force between the defendant and the plaintiff, their heirs and assigns, unless that agreement should be in any way broken by the plaintiff; then the defendant, his heirs or assigns, should be at liberty to take immediate possession of the said house and premises, and whatever loss might be sustained in the premises being unoccupied or unlet, should be defrayed by the plaintiff, his heirs, executors, or assigns, until the termination of that agreement; but each party should be at liberty to let the said house and premises, on conditions of the defendant, his heirs or assigns, sustaining no loss thereby; but underletting was not to be allowed, only in default of the plaintiff, his heirs, or assigns, keeping to that agreement: and it was thereby further agreed by the plaintiff and the defendant, that, unless death or continued ill-health in either case should take place, or the plaintiff should in any way break that agreement, the defendant promised to provide two bed-rooms over the intended school-room, according to the defendant's own plan, and not before the year of our Lord 1844; and, as it was above stated, when such rooms should be provided, the said plaintiff thereby agreed to pay an additional rent of £5 per annum, until the expiration of that agreement of the defendant and plaintiff: all rates and taxes to be paid by the plaintiff. The declaration then averred mutual promises, and performance of the agreement by the plaintiff; and alleged, as a breach, that, although the whole of the year 1844, with the exception of a few days thereof, had elapsed, and although the defendant had not been prevented by continued ill-health, he had not, although often requested, provided any bed-rooms over the said intended school-room, pursuant to his agreement in that behalf.

The defendant pleaded several pleas, which it is not

1845.
 IRELAND
 v.
 HARRIS.

1845.
 IRELAND
 v.
 HARRIS.

necessary to refer to; and at the trial, before *Moule, J* at the last Northampton assizes, the plaintiff obtained verdict.

In Easter Term, *Hill* obtained a rule to shew cause why the judgment should not be arrested; first, on the ground that the agreement only bound the defendant to provide the bed-rooms before the *end* of the year 1844, and that there was no averment in the declaration that a reasonable time for the performance of the work within that year did not remain; secondly, on the ground that it was not averred that there had not been any continued ill-health on the part of the *plaintiff*.

Humfrey and *Waddington* now shewed cause.—This declaration is framed on an agreement for the occupation of a house and school-room; and it alleges, “that it was further agreed by the plaintiff and defendant, that, unless death or continued ill-health in either case should take place, or the plaintiff should in any way break that agreement, the defendant promised to provide two bed-rooms over the intended school-room, according to the defendant’s own plan, *and not before the year 1844.*” The breach is, that although the whole of the year 1844, except a few days, had elapsed, the bed-rooms had not been provided. The meaning of that part of the agreement is not that the rooms should be provided before the *end* of the year 1844, but that the defendant should not be called on to build the rooms *before* the year 1844; and it is important to notice, that the agreement was made in 1842. The objection made to the sufficiency of this declaration is, that there is no averment that a reasonable time did not remain for the execution of the work in the year 1844. The action was commenced in December; that is before the Court, and need not be averred. [*Parke, B.*—This is a work of time and cannot be done in a moment, though it is to be done generally on request.] In every case of an agreement to

do a thing on request, *some* time must be occupied in doing it. The intention here was, that the defendant should build the rooms on request, but not before the year 1844. Now the declaration avers a request, and that the work was not done. After verdict, that is sufficient; for every intendment must be made in favour of the declaration. Suppose the defendant had begun to build, and had done as much as he could reasonably have accomplished; in that case there would have been no breach of the agreement. That would have been a good answer. This agreement is evidently framed by the parties themselves, and should receive a reasonable construction. Then it is further objected, that the declaration should have averred that there was no continued ill-health on the part of the plaintiff. The words are, "unless death or continued ill-health, in either case;" which it is said means the death or ill-health of either *party*. [Parke, B.—It possibly does not apply to either party, but means, either in the event of death or of ill-health. Alderson, B.—I should have considered it to mean, "Unless I die, or continue in ill-health." The defendant did not intend that his executors should have to do it.] The defendant was a builder, and the meaning was, that he would build the rooms if he lived, and was well enough to do so. [Parke, B.—You are travelling out of the record. No doubt the fact of his being a builder affords strong ground for that construction; but we cannot take notice of that fact, because it is not on the record. The agreement should be stated according to its legal effect.] The agreement is declared on as one entire contract; and, looking to the nature of it, could the parties have meant that this should depend on the plaintiff's state of health? What is the meaning of ill-health? [Parke, B.—It means such a state of health as would render him incapable of doing the work.] What length of continuance of ill-health is it to be? At all events, if this be a defect in the declaration, it is one

1845.

IRELAND
v.
HARRIS.

1845.
 {
 IRELAND
 v.
 HARRIS.

which is cured by verdict: *Stennel v. Hogg* (a). It is also matter of defeazance, and should come from the other side. [*Parke, B.*—A defeazance is a matter coming *after*—this comes by way of proviso.] In the case of *Wynne v. Wynne* (b), where a rent-charge, with power of distress, was devised to a married woman for life, “or so long as her conduct and behaviour should be discreet, and meet with the approbation of the testator’s trustees,” in an avowry under the power of distress for the arrears of rent-charge, it was held, that it was not necessary to aver that her conduct had been discreet, &c., it being a condition subsequent, and that the onus was on the plaintiff to shew a breach of it. [*Parke, B.*—This is not by way of defeazance, for the contract is incomplete without it.]

Hill and Mellor, in support of the rule, were not called upon.

PARKE, B.—We are to confine ourselves to the record, and from that it appears that the plaintiff, being a schoolmaster, entered into a contract with the defendant for the occupation of a house as a school, and the stipulation is that it should be fitted up by the plaintiff; and it was further agreed as follows [his Lordship stated the agreement, and continued]: The question turns on the meaning of the words “unless death or continued ill-health, in either case, should take place.” Now it is clear that these words refer to the death or ill-health of some person; and the question is, whether they do not apply to both parties; so that, if the plaintiff had died, his executors could not have enforced the performance of the contract. *Death* must apply to both. That is only reasonable, because the plaintiff is a schoolmaster, and the providing of the rooms had reference to a continued occupation of the house as a school. And then, looking to the contract alone, it seems to me a

(a) 1 Saund. 228. (b) 2 Man. & G. 8; 2 Scott, N. R., 278, 615.

e construction to hold, that both parties must be state of health before there could be a complete the contract. The work is not to be done unless ies are in good health ; that is, therefore, a con- cedent to its performance, and should have been the declaration. The fact of the defendant being might have raised some doubt, but that does not i the record. I therefore think this declaration d that the judgment must be arrested.

1845.
 }
 IRELAND
 v.
 HARRIS.

son, B., concurred.

, B.—I agree with my Brother *Parke*, and in- further, for I think, had the fact of the defendant builder appeared on the record, the declaration t have been good.

Rule absolute.

HARVEY v. BRYDGES and Others.

June 27.

ASS.—The declaration stated, that the defend- i force and arms, &c., broke and entered a certain ; cottage, and dwelling-house of the plaintiff, ring, and being in a certain place called or known Scotia Gardens, in the parish of St. Martin, Green, in the county of Middlesex, and which he actual possession and occupation of the plain- then with force and arms evicted, ejected, ex-

en, and then expelled the plaintiff from the possession and occupation of the same. e messuage, cottage, &c., were the soil and freehold of the defendants, wherefore tted the said trespasses in the said messuage, &c., as they lawfully might for the aid:—*Held*, first, that the plea of lib. ten. was a good plea to this declaration, al- close was particularly described in the declaration ; secondly, that it was not to be m the declaration that there was any breach of the peace or forcible entry, the aver- t arms being a mere formal allegation that the defendants entered with *some* force, enable them to get into possession.

Trespass.
 The declaration stated, that the defendants, with force and arms, broke and entered a cer- tain messuage, cottage, and dwelling-house, situate in Nova Scotia Gardens, in the parish of St. Martin,

1845.
 HARVEY
 v.
 BRIDGES.

pelled, put out, and amoved the plaintiff and his family from the possession, occupation, and enjoyment of the same.

Plea, that the said messuages, cottage, &c., were the soil and freehold of the defendants, wherefore they committed the said alleged trespasses in the said messuage, cottage, &c., as they lawfully might for the cause aforesaid.

General demurrer, and joinder in demurrer.

The plaintiff's point was, that the common bar was not admissible in an action for a trespass in the plaintiff's dwelling-house, and that it afforded no justification for a forcible entry into it.

Lush, in support of the demurrer.—The question is, whether the plea of liberum tenementum is a good answer to this declaration. That plea is never good, when the place is particularly described and defined in the declaration; it is only allowed when the declaration is general, in order to compel the plaintiff to describe the abuttals of the property. Here the premises are described as situate in Nova Scotia Gardens, and in the occupation of the plaintiff. The plea never was good, on principle, by way of justification, but it has been sanctioned by usage where the declaration is general, in order to compel a more accurate description of the place where the trespass is supposed to be committed. In *Lambert v. Stroother* (a), the question was discussed whether liberum tenementum was a good plea, when pleaded to a declaration in trespass which gives a particular description of the premises. *Willes*, C. J., in delivering the judgment of the Court, says: "Formerly, when a plaintiff only declared generally, it was thought a great hardship on the defendant to be obliged to answer such a general charge; for if the plaintiff had a large estate in the

(a) *Willes*, 218.

construction to hold, that both parties must be in a state of health before there could be a complete contract. The work is not to be done unless the parties are in good health ; that is, therefore, a condition precedent to its performance, and should have been so declared in the declaration. The fact of the defendant being in a state of health might have raised some doubt, but that does not appear on the record. I therefore think this declaration should be sustained, and that the judgment must be arrested.

ION, B., concurred.

B.—I agree with my Brother *Parke*, and in-
urther, for I think, had the fact of the defendant
uilder appeared on the record, the declaration
have been good.

Rule absolute.

1845.

 IRELAND
 v.
 HARRIS.

HARVEY v. BRYDGES and Others.

June 27.

ASS.—The declaration stated, that the defendants, with force and arms, broke and entered a certain cottage, and dwelling-house of the plaintiff, and being in a certain place called or known as Scotia Gardens, in the parish of St. Martin, Green, in the county of Middlesex, and which was the actual possession and occupation of the plaintiff, then with force and arms evicted, ejected, excluded, and then expelled the plaintiff from the possession and occupation of the same; and that the defendants, with force and arms, committed the said trespasses in the said messuage, &c., as they lawfully might for the purpose of recovering the said premises. The plea was—*Held*, first, that the plea of lib. ten. was a good plea to this declaration, although it was particularly described in the declaration; secondly, that it was not to be taken as a denial of the declaration that there was any breach of the peace or forcible entry, the averment being a mere formal allegation that the defendants entered with *some* force, and expelled the plaintiff from the possession and occupation of the same.

1845.
 HARVEY
 v.
 BRYDGES.

persuading us that this is a bad plea, after it has been allowed for such a length of time. We cannot overturn what has been the constant practice so long.]

Then, secondly, if it be a good plea to an action of trespass *quare clausum fregit*, it is not a good plea to this declaration, which states a forcible entry, and expulsion of the plaintiff from the house. The plea justifies it on the ground that the defendants are owners of the freehold; but their being so will not justify a breach of the peace. The plea puts forward this proposition,—that a party who can shew himself to be the owner of the freehold, may enter upon the possession of the occupier of a house, night or day, and violently turn him out of it. [*Parke, B.*—You assume a breach of the peace, which is really assuming too much.] This point arose, but was not decided, in *Newton v. Harland (a)*. [*Parke, B.*—It does not arise here, ~~as~~ there may have been a *legal* possession only. The declaration does not necessarily mean that the plaintiff was actually in possession. All the plaintiff would be bound to prove would be an entry on the land.] The defendants justify the whole of the trespasses alleged, and they thereby undertake to justify all the force that the plaintiff can prove under his declaration. [*Parke, B.*—No. They undertake to justify, not all the force that the plaintiff can prove, but all that he *must* prove to support the action.—The plea justifies an entry with *some* force—as much ~~as~~ would amount to legal force.] The defendants ought to have pleaded that they used no more force than was necessary, and then the plaintiff would have been at liberty to have replied and put in issue the excess. [*Parke, B.*—Is there no force whatever that a party may use to get into possession?] Not any amounting to a breach of the peace. [*Parke, B.*—That is not alleged in this declaration. It in truth alleges no force at all, and if issue had been taken on the allegation of *vi et armis*, the plaintiff

(a) 1 Man. & Gr. 644; 1 Scott, N. R. 474.

would not be bound to prove any force. If you had replied that the defendants used more force than necessary, you would have raised the question in *Newton v. Harland*. You might have averred that the defendants entered in a violent manner, and with a breach of the peace; but not having done so, you can claim no advantage from that illegal act, if it existed.] The averment of *vi et armis* is equivalent to an allegation of a breach of the peace and forcible expulsion: *Rex v. Storr* (a), and *Rex v. Bathurst*, there cited. The declaration here uses words which amount to the statement of a breach of the peace, and the plea does not aver that the defendants entered using no more force than necessary: *Leeward v. Basilee* (b). [Parke, B.—That is no objection to the plea on general demurrer. Alderson, B.—If the defendants might lawfully enter with any force, you admit it by your demurrer. In *Rex v. Wilson* (c), the allegation of *vi et armis* is expressly distinguished from that of *manu forti*.]

Hugh Hill, contra, referred to Reeves's History of the Common Law, Vol. 2, pp. 340—343, and was then stopped by the Court.

PARKE, B.—We think our judgment must be for the defendants. The plea of *liberum tenementum* was originally invented for the purpose of driving the plaintiff to prove his title to the disputed close; and there can be no doubt, that, in order to free himself from the necessity of doing that, the plea would have been demurred to long ago, if any one had thought such a demurrer would be successful. This is the use of that plea; and indeed, in one case, the Court of Queen's Bench held that you cannot go into evidence of title under a plea of not possessed. But then it is argued, that the plea of *liberum tenemen-*

1845.
HARVEY
v.
BRYDGES.

(a) 3 Burr. 1696.

(b) 1 Salk. 407.

(c) 3 T. R. 357.

1845.
 HARVEY
 v.
 BRYDGES.

tum is not good when the *place* of the supposed trespass is described in the declaration; but the only effect of describing the close in the declaration is, as appears from the case of *Cocker v. Crompton* (a), that the defendant then knows the precise spot in which the trespass is charged to have been committed, and must therefore make out his title to the freehold on that very spot; and, on his proving a *prima facie* right to enter the close, because it is his freehold, it will be competent to the plaintiff to prove that it has been demised to him, and to shew his lease if he have one. The next point was that raised in *Newton v. Harland* (b); and if it were necessary to decide it, I should have no difficulty in saying, that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt, that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though, in so doing, a breach of the peace was committed. But the point does not arise in this case; for we cannot intend on these pleadings that there was any breach of the peace or forcible entry by the defendants. The expression in the declaration, "that they entered the premises *vi et armis*," is a mere formal allegation, implying that they entered with some kind of force,—with a degree of force sufficient to enable them to get into possession, and which might or might not amount to a breach of the peace. In *Lowe v. King* (c), it was held, that the words "*vi et armis*" in a declaration in trespass are mere matter

(a) 1 B. & C. 489; 2 D. & R. N. R., 3, 474, 502.
 719.

(c) 1 Saund. 81.

(b) 1 Man. & G. 644; 1 Scott,

of form, the omission of which is aided, on general demurrer, by the stat. 27 Eliz. c.5, and which call for no answer from the defendant. It is true, that the words "using no more force than necessary" are usually inserted in pleas in trespass, but many precedents omit them; and, even supposing this improper, the plaintiff could not take advantage of the defect on general demurrer. Under the words "vi et armis," the plaintiff need not have proved anything; neither was he bound to prove the eviction; proof of the trespass would have been enough: and the defendants must only be taken as answering what the plaintiff would be bound to prove.

1845.
 HARVEY
 v.
 BRIDGES.

ALDERSON, B.—I agree with my Brother *Parke* upon both points. The plea of liberum tenementum is equally applicable, whether the place is mentioned in the declaration or not. In the one case, the defendant says, "I suppose you are going for such a close, and I tell you it is mine:" in the other, when the place is described, he says, "I know you are going for such a close, and I tell you it is mine." The other point comes to this: may a freeholder lawfully enter on his own premises with any degree of force—for the distinction is very plainly taken in *Rex v. Wilson* (a), between entering, even a dwelling-house, vi et armis simply, and entering it manu forti? I have still the misfortune to retain the opinion that I expressed in *Newton v. Harland*, although the majority of the Court of Common Pleas have held the contrary; but as the plaintiff in this case has not new assigned, so as to raise that point, we need not decide it at present.

PLATT, B., concurred.

Judgment for the defendants.

(a) 8 T. R. 357.

1845.

June 27.

CURTIS, Bart., v. SCALES and Others.

On the 8th of February, 1810, a license was granted by the lord of a manor to a copyholder, to demise part of his copyhold premises to A. K. for seventy-one years, saving to the lord all fines &c., in as ample a manner as if the license had not been granted. On the 4th of April, 1810, a second license was granted to him to demise the remainder of the copyhold tenement (excepting the land demised to A. K.) for the term of seventy-one years, with this condition, "that, in consequence of his engagement to improve the said premises, and paying unto the lord a fine for his license, it is hereby agreed, that, during the said term of seventy-one years, the fine on all future admissions shall be at and after the rent of £37 per year,

THIS was an action of debt by the plaintiff, as lord of the manor of Tottenham, in the county of Middlesex, against the defendant, for a fine claimed to be due to the plaintiff, upon the admission of the defendants to certain customary tenements, parcel of the said manor.

Issue having been joined, the following case was stated for the opinion of this Court:—

The plaintiff, before and at the time of the admittance of the defendants, was, and still is, lord of the manor of Tottenham; and the defendants are the trustees and devisees of John Scales, who was a copyholder of the said manor. On the 23rd of April, 1808, John Scales, the testator, was admitted tenant of a certain copyhold tenement in the parish of Tottenham; and on the 8th of February, 1810, a license was granted to him to demise part thereof. The license empowered him to demise to A. King all that piece or parcel of orchard ground, &c., for the term of 71 years, from the 25th of March then next ensuing, saving to the lord all and singular the fines, &c., due or hereafter to become due for and on account of the said premises, or of any part thereof, in as full and ample a manner as if the license had not been granted. On the 4th of April, 1810, a license was granted to Scales to demise the remainder of the copyhold tenement to which he had been admitted on the 23rd of April, 1808. The terms of the license were, that John Scales should be at liberty to let all or any part or parts of that uncustomary orchard, &c., to which he was admitted on the 23rd of April, 1808, for the whole, and so in proportion for every less quantity of land:—Held, that the words "the whole" meant the whole of the residue which had not been demised to A. K.; and that the executors of the copyholder were bound to pay, on their admission to the whole of the premises, not only the two years' improved value on £37 per annum, but also two years' improved value of the premises demised to A. K.

excepting one piece of land now let to A. King), for the term of 71 years from the 25th of March last, saving always to the lord of the manor all the rents, amerciaments, &c.; with this condition:—"That in consequence of his engagement to improve the said premises, and paying unto the lord a fine for his license, it is hereby agreed, that, during the said term of 71 years, the fine on all future admissions or surrenders shall be at and under the rent of £37 per year *for the whole*, and so in proportion for any less quantity of land, and from and after the expiration of the said term of 71 years, the fine shall be as customary in the said manor, on the improved rent of these premises."

The defendants, who were devisees in trust under the will of John Scales of the said copyhold premises, were, on the 27th of July, 1843, admitted tenants of the premises so devised to them, subject to all the provisions, agreements, &c., expressed of and concerning the same.

According to the custom of the said manor, an arbitrary fine is payable to the lord upon admission of any tenant. Upon the admission of the defendants, a fine, amounting to the sum of £322, was claimed by the plaintiff, which was assessed upon the following principle: in respect to that part of the said premises which is demised to A. King, the annual value of which is admitted to be £55, two years' improved value for the first of the lives, £110; half of that for the second life, £55; half again for the third life, 27*l.* 10*s.* The fine payable in respect of the remainder of the said premises was computed, not according to the improved value, but according to the annual value of £37, viz. :—

1845.

CURTIS
v.
SCALES.

1845.
 CURTIS
 v.
 SCALES.

Two years' value for the first of the			
lives at £37 per annum	.	£74	0 0
Half of that for the second life	.	37	0 0
Half again on the third life	.	18	10 0
			<hr/>
		129	10 0
Add	.	192	10 0
			<hr/>
Total	.	£322	0 0

Which sum was demanded of the defendants before the commencement of this action. The defendants refused to pay it, but paid to the plaintiff the sum of 129*l.* 10*s.* as three and a half years' annual value at £37 a year, which the plaintiff accepted, without prejudice to his right to recover the remaining sum of 192*l.* 10*s.*, if he was so entitled.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the remaining sum of 192*l.* 10*s.*, and upon the decision of the Court, judgment is to be entered for the plaintiff or defendants by confession, or of *nolle prosequi*, or otherwise, as the Court may think fit.

Smirke, for the plaintiff.—It cannot be disputed, that if there had been no license or agreement between the parties, the lord would be entitled to a fine upon the improved value of the premises; but the question turns on the condition or proviso in the second license of the 4th of April, 1810, which empowered Scales to demise the remainder of the copyhold tenements to which he was admitted on the 22nd of April, 1808. There is nothing to shew that the proviso extended beyond the license; and the fine, which is there mentioned to be "at and after the rent of £37 per year for *the whole*," means for the whole of the premises comprised in that license only. The proviso commences by saying, "that in consequence of his engage-

ment to improve the *said premises*," that can refer only to the premises mentioned in that second license, and not to the premises demised to King. The words "the whole" have reference to the words "and so in proportion for any less quantity of land," and mean the whole land or any less quantity, which clearly confines it to the land therein comprised.—[He was then stopped by the Court].

1845.
CURTIS
v.
SCALES.

Dowling, Serjt., contra.—The lord is only entitled to a fine upon the rent of £37 a year, in respect both of the premises contained in the license to demise to King, and those held by John Scales in his lifetime. In the first license there is the following exception, "saving to the lord all and singular the fines, &c. due, or hereafter to become due, for and on account of the said premises, &c., in as full and ample a manner as if this license had not been granted." That shews an intention to reserve the fines; and then, by the second license, the parties fix the fine as applicable to the premises mentioned in both. The term, also, is the same in both licenses, namely, seventy-one years. It is only by looking to both instruments that you can find the intention of the parties. The fine on all future admissions is to be "at and after the rent of £37 per year for *the whole*;" and those words override the whole of the premises. [*Alderson*, B.—No; the word "premises" means what is premised before in that instrument, but the premises which had been let to King are not there mentioned or referred to. *Parke*, B.—By the proviso in the second license the fine is fixed "in consequence of the tenant's engagement to improve the premises:" that cannot refer to the premises demised to King, as he would have no right to make any alterations in those premises.] Scales may have stipulated with King that he should make improvements.

PARKE, B.—The question depends upon the construc-

1845.
 CURTIS
 v.
 SCALES.

tion to be put upon, and the meaning to be gathered from, the two documents themselves, as we have no other facts disclosing the intention of the parties, by which our judgment may be guided. The first license, which took place in February, 1810, reserved the *customary* fees, without any stipulation as to the amount; and the lord reserved to himself all fines, &c. due, or thereafter to become due, on account of the premises mentioned in it, in as full and ample a manner as if the license had not been granted. Then, two months afterwards, he grants a second license to Scales to demise the remainder of the copyhold premises, except that part which had been demised to King, saving always to the lord all rents, amerciaments, &c.; making a difference with respect to the fine, that, in consideration of his engagement to improve the premises, he is to pay a certain fine on all future admissions or surrenders, namely, a fine "at and after the rent of £37 a year for *the whole*." Now that word appears to me to mean all the property comprised in the second license. It is said that the two transactions are connected together, but it appears to me that there is nothing so to connect them. The case is a very plain one. Whether this agreement would bind any one but Sir William Curtis and his executors, on the one hand, and Mr. Scales' executors on the other, is a point on which I give no opinion.

ALDERSON, B.—I am of the same opinion. If you look at the words of the proviso, it is clearly confined to the premises mentioned in the second license. The words are "that, in consequence of his engagement to improve the *said premises, and paying unto the lord a fine for his license*, it is hereby agreed, that, on all future admissions, the fine shall be at and after the rent of £37 per year for *the whole*," which surely must mean the whole of the premises before-mentioned.

ROLFE, B.—I also think the *whole* means what is mentioned in the second license; but it must not be taken that the defendant would be entitled if it were otherwise.

1845.

CURTIS
v.
SCALES.

PLATT, B.—The license contemplates the letting of that portion of land which had not been demised to King, to one or more “person or persons, who shall be a proper tenant or tenants.” It therefore contemplates several leases, and therefore it was proper to use the word “whole,” which only applies to that part of the premises which had not been let to King, and means the *whole* of those premises.

Judgment for the plaintiff. ;

WALFORD v. FLEETWOOD.

June 27.

INDEBITATUS ASSUMPSIT for money lent, money paid, and money had and received, and on an account stated.

A defendant who is an attorney of two of the superior Courts may be sued in either at the option of the plaintiff.

The defendant pleaded in abatement, that he was an attorney of the Court of Queen’s Bench, but the plea did not aver that he was not an attorney of this court.

Replication, that the defendant was and is an attorney of this court, concluding with a verification.

General demurrer, and joinder.

Atkinson, in support of the demurrer.—The defendant, being an attorney of two courts, may choose the court in which he will be sued. The prescriptive right of the defendant, as an attorney, to be sued in his own court, overrides the right of individuals, and is paramount to the plaintiff’s right to sue him here. If the plaintiff and defendant were in equali jure, as if both were attorneys, the

1845.
 WALFORD
 v.
 FLEETWOOD.

defendant would lose his privilege, as it would be privilege against privilege: *Guy v. Rennell* (a), *Clapham v. Lenthall* (b). [*Parke, B.*—This case is a novel one; for, if you cannot sue him here, how otherwise is the defendant to be sued? If you sued him in the Court of Queen's Bench, he would plead his privilege in this court. At the time the old pleas were framed, a person was only an attorney of one court, but now he may be an attorney of two or more. The question is, whether the plea ought not to go on, and deny that he was an attorney of the other court in which he is sued.] That the privilege of an attorney to be sued in his own court still exists, is shewn by *Lewis v. Kerr* (c), where it was held that such privilege is not taken away by the Uniformity of Process Act, 2 Will. 4, c. 39. If the plaintiff had a privilege to set off against the privilege of the defendant, the case might be different; but, having this privilege, and there being nothing to gainsay it, he has a right to say he will be sued in which of the courts he pleases. [*Parke, B.*—The difficulty is, that the defendant ought in his plea to give the plaintiff a better writ, and it is a question whether he ought not to have shewn that he was not an attorney of this court.]

Secondly, the plaintiff ought to have concluded his replication with a prout patet per recordum, as the name of every attorney is on the records of the court of which he is an attorney; and by the recent act, 6 & 7 Vict. c. 73, s. 2, no person is to be allowed to act as an attorney or solicitor unless he shall have been admitted and enrolled. And as the attorney can only be created by matter of record, it can only be proved by matter of record, and it should be pleaded with a prout patet per recordum: *Rex v. The Earl of Banbury* (d).

Pashley, contra.—The last objection, not being pointed

(a) 2 Brownl. 266.

(b) Hardres, 365.

(c) 2 M. & W. 226.

(d) Skin. 517, 520.

: by special demurrer, is cured by 4 & 5 Ann. c. 16, s. 1; : if it had not been so, it has been assumed that this is tter of record, which it is apprehended it is not; there is *record* of the attorney's admission, but merely an entry his name on the rolls of the Court. Then as to the first nt; if the defendant wanted to avail himself of his privilege, he ought at least to have averred that he was not an orney of this court, as was done in *Lewis v. Kerr*. And imilar averment was made in *Hunter v. Neck* (a). [Parke, —The decision of this court in *Percival v. Cooke* (b) was, it such an averment was not necessary, and that the a in the old form was good; but Lord Abinger, C. B., s, that the plaintiff may allege in his replication that is an attorney of this court, if the fact be so.]

1845.
WALFORD
v.
FLEETWOOD.

Atkinson replied.

PARKE, B.—I think there ought to be judgment of respondeat ouster. The plea, that the defendeat is an orney of the Court of Queen's Bench, is *prima facie* a od plea. Then the replication states, that the defendant an attorney of this court; and if he is an attorney in both arts, the plaintiff may choose in which court he will sue n. If he chooses to be an attorney of both courts, he y be sued in either, otherwise he would escape being ed altogether; for if you sued him in one court, he ould plead his privilege in another. An attorney cannot allowed to plead his privilege in the three courts: or it ould be impossible to sue him at all.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment of respondeat ouster (c).

(a) 3 Man. & G. 181; 3 Scott,
R. 448.
(b) 5 M. & W. 293.

(c) See *Rustrick v. Beckwith*,
14 Law J. (N. S.), C. P., 1.

1845.

June 26.

SMITH and Others v. MAWHOOD.

The 25th and 26th sections of the Excise License Act, 6 Geo. 4, c. 81, which subject to penalties any manufacturer of or dealer in or seller of tobacco, who shall not have his name painted on his entered premises in manner therein mentioned; or who shall manufacture, deal in, retail, or sell tobacco without taking out the license required for that purpose, do not avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections; their effect is merely to impose a penalty on the offending party for the benefit of the revenue.

But where it appears that the intention of the legislature was to prohibit the contract itself, although that be only for purposes of revenue, the contract is illegal and void, and no action can be maintained upon it.

An allegation in a plea, that the tobacco, for the price of which the action was brought, was sold by the plaintiffs "as manufacturers of tobacco," after the stat. 6 Geo. 4, c. 81, and if they had not a license under that act, is not a sufficiently direct allegation that the plaintiffs were manufacturers of tobacco, so as to come within the provisions of the act.

DEBT for goods sold and delivered, and on an account stated.

Second plea, that the goods in the first count mentioned were divers quantities of tobacco, and the same, and each and every of them, were sold and delivered by the plaintiffs, as manufacturers of tobacco, after the 5th July, 1835, to wit, on &c., and that the account in the last count mentioned was stated between the plaintiffs and the defendant of and concerning the monies claimed to be due from the defendant to the plaintiffs, in respect of the said sale and delivery of the said goods, and of and concerning no other monies or debts, and the money in the last count mentioned as found to be due upon the said account, was and is the money claimed to be due in respect of the said sale and delivery of the said goods, and no other money; and that the plaintiffs had not, at any time before, or at the time of the sale and delivery of the said goods, or any or either of them, taken out or obtained any excise license, required by the statute in such case made to be taken out by every manufacturer of tobacco or snuff, or any excise license required to be taken out by every dealer in or seller of tobacco or snuff, and containing or setting forth the purpose, trade, or business of the plaintiffs, and the true names and places of abode of the plaintiffs, and the place at which their business was carried on, and authorizing them to sell the said tobacco; but, on the contrary thereof, the plaintiffs sold and delivered the said tobacco, and every part thereof, without having taken out any excise license authorizing them to manufacture or sell

ie said tobacco, contrary to the form of the statute in such case made.—Verification.

Third plea, that the plaintiffs, before and at the time of contracting the several supposed debts in the declaration mentioned, were manufacturers of and dealers in tobacco, and were and are, as such manufacturers and dealers, required by the laws of the excise to make entry of their remises, in order to exercise and carry on therein their trade and business as such manufacturers and dealers in tobacco; and that the plaintiffs, before and at the time of the sale and delivery of all the goods in the first count mentioned, had taken out such excise license as by the statute in such case made is required to be taken out by every manufacturer of tobacco or snuff, and had duly entered the premises in which they exercised and carried on their said trade and business, to wit, premises situate and being No. 57, Red Cross-street, Cripplegate, in the city of London; and that the goods in the first count mentioned, and every of them and every part thereof, were tobacco and delivered at the said premises to the defendant by the plaintiffs, as such manufacturers, so exercising and carrying on business at and in the said premises, and in the course of the said trade and business of manufacturers and dealers in tobacco, carried on by them in and upon the said premises, and after the fifth day of July in the year of our Lord 1825, to wit, on the 15th March, 1845; and that the account in the last count mentioned was stated of and concerning the price of such goods so sold and delivered as in this plea aforesaid, and of and concerning no other monies or debts; and the money in the last count mentioned, as found to be due upon the said account, was and is the price of such goods so sold and delivered as in this plea aforesaid, and no other money. And the defendant further says, that the plaintiffs had not, before or at the time of the said sale, painted, placed, or fixed, or caused to be painted, placed, or fixed, in letters

1845.

SMITH
v.
MAWHOOD

1845.
SMITH
v.
MAWHOOD.

publicly visible and legible, and at least one inch long, is or upon their said entered premises, their names respectively, at full length, or the name or style of the firm or partnership under which the plaintiffs carried on the said trade and business, and after each name or names the word "licensed," with any word or words added thereto necessary to express the purpose, or trade or business, for which such license had been and was granted, in some conspicuous place on the outside of the front of the said premises, over the principal outward door or gate or entrance door thereto, and not more than three feet from the top of such outward door or gate or entrance door; but on the contrary thereof, the plaintiffs wholly neglected so to do, and therein wholly failed and made default, contrary to the form of the statute in such case made: and the plaintiffs sold and delivered the said goods to the defendant, as each and every of them, at and from the said premises contrary to the form of the statute in such case made.—
Verification.

The plaintiffs demurred specially to each of these pleas and assigned (inter alia) the following causes of demurrer to the second plea:—That the said second plea confesses the matter and substance of the said declaration, but does not avoid the same: That the want of such license or licenses as in the said second plea mentioned does not invalidate the contracts confessed in and by the said plea, or bar the plaintiffs from recovering upon the same: That the said second plea does not state or shew any cause or reason why the plaintiffs were bound to take out a license to manufacture tobacco, or a license as dealers in or sellers of tobacco: That it is not stated in or by the second plea that the plaintiffs were at any time *manufacturers* of tobacco, and that if it be meant by the allegation in the plea contained, to the effect that the said goods were sold by the plaintiffs *as* manufacturers of tobacco, to imply that the plaintiffs were such manufacturers, the said allegation

is indirect and argumentative, and presents and offers no certain, decisive, or pertinent issue; whereas the defendant ought to have directly and positively stated that the plaintiffs were manufacturers of tobacco at the time of the said sale: That it is not averred in or by the said second plea, that the plaintiffs were at any time *dealers in* or sellers of tobacco, and that the same cannot be properly inferred from the fact in the said plea mentioned, that the plaintiffs have sold tobacco to the defendant; and that even if it could be so inferred, the said plea is insufficient, uncertain, and informal, in not directly and positively alleging that the plaintiffs were dealers in or sellers of tobacco at the time of the said sale to the defendant: That it is not stated or shewn in or by the said second plea, that the said tobacco so sold and delivered by the plaintiffs to the defendant was tobacco manufactured by the plaintiffs, nor does it even appear by the said second plea that the said tobacco was manufactured and not raw tobacco: That for aught that appears in or by the said second plea, the said tobacco might have been foreign tobacco, remaining deposited and secured in the import warehouses, before payment of the import duty thereon, and legally saleable without a license, according to the provisions of the said statute: That it is not stated in or by the said second plea, that the plaintiffs were not duly licensed at the time of their *manufacturing* the said tobacco, (if it be intended to allege that they did manufacture the same), but on the contrary thereof, it is quite consistent with the said second plea, that the plaintiffs, being duly licensed, manufactured the said tobacco and sold the same to the defendant at some subsequent time, when the plaintiffs had ceased to be manufacturers of tobacco, and yet were not dealers in the same: That it does not appear in or by the said second plea, that the said sale or manufacture of the said tobacco was made or took place in the United Kingdom of Great

1845.
SMITH
v.
MAWHOOD.

1845.
 SMITH
 v.
 MAWHOOD.

Britain and Ireland, or that the plaintiffs or the defendants were resident in the said kingdom, or subject to the jurisdiction thereof: That it does not distinctly appear in or by the said second plea, that the plaintiffs did not take out licenses at some time after the said sale and delivery, during the same year, computed as in the said statute mentioned, authorizing them by relation to manufacture and sell the said tobacco in the said plea mentioned: That it does not appear in or by the said second plea that the plaintiffs were not properly licensed at the time of the making of the said account as in the said plea mentioned: That to the last count of the declaration, the said plea avers to the general issue, &c.

The causes of demurrer to the third plea were:- the facts in that plea mentioned do not constitute a defence to this action, the same being directly collateral to the contracts in the declaration mentioned: That it does not appear in or by the said third plea, that the tobacco therein mentioned was tobacco manufactured by the plaintiffs, nor is it even shewn that it was manufactured tobacco, and not raw tobacco: That if it can be implied from any averments in the said third plea that the said tobacco was manufactured by the plaintiffs, such averments are direct and argumentative: That the plea ought to have shewn, and does not shew, that the particular sale mentioned was one requiring a manufacturer's or a dealer's license to authorize it: That it is not directly and affirmatively stated that the names of the plaintiffs, or the name or style of the firm or partnership under which they traded on their business, were not painted, placed, or written in or upon the said premises, but only that the plaintiffs had not painted, placed, or fixed, or caused to be painted, &c., the said names as aforesaid: That it is not shewn in or by the said third plea that the said last mentioned tobacco was upon the said premises at the time

the said sale: That so far as it relates to the last count of the declaration, the said third plea amounts to the general issue, &c.

Joinder in demurrer.

1845.
SMITH
v.
MAWHOOD.

Fish, in support of the demurrer.—Both these pleas are bad in substance. The substantial question in the case depends on the construction to be put upon the 25th and 26th sections of the Excise License Act, 6 Geo. 4, c. 81 (a). On the part of the plaintiffs it is contended,

(a) Sect. 25 enacts, "that all and every person or persons in the United Kingdom, required by any law or laws of excise to make entry of his, her, or their premises, in order to exercise or carry on any trade or business for which an excise license is required, and who shall have taken out such license, shall paint or cause to be painted, or shall place and fix, in letters publicly visible and legible, and at least one inch long, in or upon his, her, or their entered premises, his, her, or their names respectively, at full length (or where there are partners or more than one person engaged in carrying on jointly the same trade or business, the name or style of the firm or partnership), and after such name or names the word "licensed," adding thereto the words necessary to express the purpose or trade or business for which such license has been granted; and such person or persons shall cause such letters to be painted or placed and fixed in some conspicuous place on the outside of the front of his, her, or their said premises, over the principal outward door or gate or entrance

door thereto, and not more than three feet from the top of such outward door or gate or entrance door: and if any such person or persons as aforesaid shall not paint or place and fix such letters as aforesaid, or shall not preserve and keep the same so painted, placed, and fixed, or shall not repaint and renew the same as often as necessity shall require, for the purpose of keeping the same in good order and condition during the continuance of his, her, or their license, he, she, or they shall forfeit, for every such offence, the sum of twenty pounds."

Sect. 26 enacts, "that if any person or persons shall make or manufacture, deal in, retail, or sell, any goods or commodities hereinafter mentioned, or shall exercise or carry on any trade or business hereinafter mentioned, for the making or manufacturing, or dealing in, retailing or selling of such goods or commodities, or for the exercising or carrying on of which trade or business a license is required by this act [s. 2, schedule], without taking out such license as is in that behalf required, he, she, or they shall for every such offence, respect-

1845.
SMITH
v.
MAWHOOD.

first, that no license is required on the sale of tobacco unless when sold by a person exercising or carrying on the trade or business of "a dealer in or seller of tobacco" and secondly, that even if such license be required to be taken out by a party not being "a dealer in or seller of tobacco," the omission to take out such license merely exposes the party to the penalty imposed by the act, and does not vitiate the contract of sale, so as to estop him from maintaining an action for the price of the tobacco sold. As to the first point, the language of the two sections of the act above referred to shews clearly that the only persons required to take out licenses are "manufacturers of tobacco and snuff," and "dealers in or sellers of tobacco or snuff;" and reason and common sense seem to dictate that such persons *only* could have been intended by the legislature to be bound to take out licenses. Can it be contended, that a merchant, to whom a quantity of tobacco is consigned from abroad for sale, is bound to take out a license to legalise the sale of it, or that a person, *not carrying on the trade of a dealer or seller of tobacco or snuff*, is to incur a penalty of £50 for selling to a friend a pound of cigars? As to the second point. Even if a license be required to be taken out to protect a sale by a party, not being a "dealer or seller," his neglect to take out such license only exposes him to a *penalty*, and does not prevent him from suing for the price of the tobacco sold. The rule of law as to an action being maintainable on a contract, where there has been an infringement of the law, is thus laid down by Lord *Tenterden* in *Wetherell v. Jones* (a). His Lordship says, "Where a contract, which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute or common law, no

ively forfeit and lose the respective penalty thereupon imposed as hereinafter follows; that is to say, [inter alia], every manufacturer of tobacco

or snuff so offending, shall forfeit and lose two hundred pounds."

(a) 3 B. & Adol. 226.

court will lend its assistance to give it effect. And there are numerous cases in the books, where an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." Now, in the present case, the sale of the tobacco is neither expressly nor by implication forbidden by the statute or common law, nor can it be said to be contrary to justice, morality, or sound policy. But, after the case of *Johnson v. Hudson* (a), the question now raised is no longer arguable. That case, indeed, was decided on the stat. 29 Geo. 3, c. 68, s. 70; but the 6 Geo. 4, c. 81, is virtually but a re-enactment of the former statute. In that case, a factor sold a parcel of prize manufactured tobacco, consigned to him from his correspondent at Guernsey, without having entered himself with the Excise Office as a dealer in tobacco, nor having any license as such; but it was held that he might yet maintain an action against the vendee for the value of the goods sold, and this, though the tobacco were sent to the defendant without a permit, at his desire, there being no fraud on the revenue, but at most a breach of revenue regulations, protected by penalties. The Court also inclined to the opinion, that such factor could not, upon this single and accidental instance, be considered as a dealer in tobacco, within the meaning of the statute, which requires every person who shall deal in tobacco first to take out a license, under a penalty. [*The Gas Light and Coke Company v. Turner* (b), *Brown v. Duncan* (c), *Bensley v. Bignold* (d),

1845.
SMITH
v.
MAWHOOD.

(a) 11 East, 180.

(b) 5 Bing. N. C. 666. S. C.,
6 Bing. N. C. 324.

(c) 10 B. & C. 93.

(d) 5 B. & Ald. 335.

1845.
SMITH
v.
MAWHOOD.

Foster v. Taylor (a), were cited and commented on, as decided in conformity with the rule of law as laid down by Lord *Tenterden* in the above case of *Wetherell v. Jones*.] As to the third plea, it is admitted that there is in that plea an allegation, that the plaintiffs are "dealers in and manufacturers of tobacco;" and therefore, perhaps, that plea cannot be objected to in point of *form*, but still the same objection applies to it as to the former plea, namely, that *the contract* is not vitiated by non-compliance with the statute, and therefore the action is maintainable.

Pearson, *contra*.—With respect to the objection, that it does not appear that this was tobacco sold in Great Britain, the answer is, that in an English court of justice that will be assumed until the contrary is stated; and if the fact were otherwise, it should come by way of replication. The same answer applies to the objection, that it does not appear but that this was foreign tobacco, in bond in the Queen's warehouses. The exception contained in the 12th section of the act comes by way of proviso upon the clauses requiring the license, and the fact ought therefore to be shewn by the plaintiff: *Thibault v. Gibson* (b). But it is said, that it is not sufficiently alleged in the second plea that the plaintiffs were *manufacturers* of tobacco, so as to come within the provisions of the 26th section. But the plea alleges that this tobacco was sold by them "as manufacturers of tobacco," which is sufficient for this purpose. In *Cope v. Rowlands* (c), the allegation of the plea was, that the work sued for was done by the plaintiff "as a stock-broker." That they sold in the character of manufacturers without a license, was enough to bring them within the statute. Another objection is that they are not shewn by this plea to have been *dealer*

(a) 5 B. & Ad. 887. (b) 12 M. & W. 83. (c) 2 M. & W. 14

in tobacco. But the 26th section has the words "make, or manufacture, deal in, *retail, or sell*;" if, therefore, they sold illegally, that is sufficient. [Rolfé, B.—It says, "if any person shall make or manufacture, deal in, retail, or sell, any goods, &c. for the making, &c. of which a license is required by this act." But no license is required for selling tobacco, unless the party be a manufacturer of or dealer in it.] The schedule to sect. 2, requires a license for "every dealer in or seller of tobacco and snuff." [Alderson, B.—That means where the sale of it is his business, not a person *who sells*.] In that view, the words "dealer in" would have themselves been sufficient. If one act of selling do not make the party a seller, how many will? [Alderson, B.—One is quite sufficient, if done eo animo, as a seller, making it his business. Rolfé, B.—Suppose an executor finds a parcel of tobacco among his testator's goods, may he not sell it? Alderson, B.—The allegation that the plaintiffs sold as manufacturers might be sufficient after verdict, but not on special demurrer. Suppose the allegation were traversed, and the proof were that they were not manufacturers, but said, "We will sell to you as if we were manufacturers;" which way would the issue be found?] If the party holds himself out in the character of a manufacturer, he is estopped from denying that character. [Alderson, B.—If it be necessary, to make him liable, that he should be a manufacturer, and also should sell without a license, you must shew both.]

With respect to the general question, it is laid down by Lord Holt, in *Bartlett v. Vinor* (a), that "a penalty implies a prohibition." This is a contract with reference to a thing prohibited, and therefore void. The case of *Brown v. Duncan* is strongly questioned by Parke, B., in *Cope v. Rowlands*. The Court ought to step in wherever they

1845.
SMITH
v.
MAWHOOD.

(a) Carth. 252.

1845.
 SMITH
 v.
 MAWHOOD.

see that the disallowing of the contract will aid the object of the legislature in securing the revenue. Every subject has an interest to assist in protecting the revenue from frauds; and the Court will not inquire into the *amount* of this interest. *Tyson v. Thomas* (a) is an authority for the defendant. [Rofe, B.—There the parties were prohibited from contracting except by the weight mentioned in the act.] In *Little v. Poole* (b), and *Law v. Hodson* (c), there was no express prohibition of the *contract*. [Rofe, B. Those were cases of regulations to protect one party to a contract from fraud by the other party.] So here the object is to protect that in which all the subjects of the realm have an interest—the revenue. What interest has the party for whom printing is done, that the printer's name should be at the bottom of the page? That provision is not directed against fraud between the parties; yet, if it be violated, the price of the work cannot be recovered: *Bensley v. Bignold* (d), *Stephens v. Robinson* (e). [Alderson, B.—But there the legislature has prohibited the act itself. If you can shew that the legislature has here prohibited the act of selling, the case falls within those authorities.] They have prohibited it, by saying that the sale shall, under such circumstances, be subject to a penalty. [Parke, B.—You must shew that the object of the legislature was to prevent the contract from being entered into. The argument on the other side is, that the only effect of its being entered into is that the party shall pay a certain sum by way of penalty, in aid of the revenue. As to the third plea, it is quite idle to say that an enactment, which requires the party to put his name of a certain length over the door of his house, amounts to a prohibition of a contract in that house unless this be done.] It is submitted

(a) M'Clel. & Y. 119.

(d) 5 B. & Ald. 335.

(b) 9 B. & C. 192.

(e) 2 C. & J. 209.

(c) 11 East, 300.

that the act of Parliament in effect prohibits a contract of sale made by the manufacturer or dealer in such a house, by the imposition of the penalty.

1845.
SMITH
v.
MAWHOOD.

Fisk was not called upon to reply.

PARKE, B.—With respect to the second plea, that is clearly defective for want of an allegation that the sale of this tobacco was a *dealing in* tobacco, so as to require a license. But, even if it were good on that ground, I think the object of the legislature was not to prohibit a contract of sale by dealers who have not taken out a license pursuant to the act of Parliament. If it was, they certainly could not recover, although the prohibition were merely for the purpose of revenue. But, looking at the act of Parliament, I think its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue. The plaintiffs, therefore, would be entitled to recover upon their contract, according to the principle laid down in *Johnson v. Hudson*.

The third plea is not bad *in form*, because it alleges that the plaintiffs are dealers in and manufacturers of tobacco: but it is bad upon the other ground, that the legislature did not intend to vitiate the contract by reason of a non-compliance with the requisites of the 26th section, but only to render the party carrying on trade upon such premises liable to a penalty. I quite agree, that if it be shewn that the legislature intended to prohibit any contract, then, whether this were for the purpose of revenue or not, the contract is illegal and void, and no right of action can arise out of it.

ALDERSON, B.—With respect to the second plea, that is clearly defective, on the special ground assigned as cause of demurrer, namely, that it does not shew that the plaintiffs were dealers in or manufacturers of tobacco; and I

1845.
 SMITH
 v.
 MAWHOOD.

shall therefore say nothing further upon it. With respect to the question arising on the third plea, I think the true principle of law is that which has been stated by my Brother *Parke*. The question is, does the legislature mean to prohibit *the act done* or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it. But here the legislature has merely said, that where a party carries on the trade or business of a dealer in or seller of tobacco, he shall be liable to a certain penalty, if the house in which he carries on the business shall not have his name, &c. painted on it, in letters publicly visible and legible, and at least an inch long, and so forth. He is liable to the penalty, therefore, by carrying on the trade in a house in which these requisites are not complied with; and there is no addition to his criminality if he makes fifty contracts for the sale of tobacco in such a house. It seems to me, therefore, that there is nothing in the act of Parliament to prohibit every act of sale, but that its only effect is to impose a penalty, for the purpose of the revenue, on the carrying on of the trade without complying with its requisites. I am of opinion, therefore, that both the pleas are bad, and that our judgment should be for the plaintiff.

ROLFE, B., concurred.

PLATT, B.—I am of the same opinion, for the reasons which have been stated by my learned Brothers. The case of *Johnson v. Hudson* appears to me to lay down the correct principle of law, and I am unable to distinguish that case from the present.

Judgment for the plaintiffs.

1845.

BAKER v. WALKER.

June 27.

3^dT.—The first count of the declaration stated, that defendant was indebted to the plaintiff in the sums of s. 6*d*. and 7*l*. 13*s*., upon a judgment recovered against defendant. The second alleged that, on the 21st of h, 1844, the defendant made his promissory note, and by promised to pay the plaintiff 26*l*. 5*s*. three months the date thereof.

a to the second count, as far as the same relates to sum of 20*l*. 15*s*. 6*d*., parcel of the said sum of 26*l*. 5*s*., he said promissory note was made and delivered by the defendant to the plaintiff for and on account of a judgment debt of 20*l*. 15*s*. 6*d*. recovered by the plaintiff against the defendant, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff.

plication, de injuriâ.

Special demurrer, assigning for causes, that the general allegation de injuriâ is inapplicable to this case, inasmuch as the plea to which it is pleaded involves matter of record, which is not triable by the country.

Order in demurrer.

3^d point marked for argument on the part of the plaintiff, as, that the plea was bad, as it shewed on the face of the record good and sufficient consideration for making the promissory note.

per Hill, in support of the demurrer.—The replication is wholly bad, as it puts in issue the matter of record alleged in the plea. [*Parke*, B.—No doubt the replication is bad, but what do you say to the plea?] Secondly, the plea is good. The promissory note is not stated to be made to order; and as it was given without consideration, the party making it was not bound to pay it. It ap-

To an action against the maker of a promissory note payable three months after date, the defendant pleaded, that the promissory note was made and delivered by him to the plaintiff for and on account of a judgment debt recovered by the plaintiff against him, and that except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff: —*Held*, that the plea was bad, inasmuch as it shewed there was an existing debt on account of which the note was made, and the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, which was a sufficient consideration for the note.

1845.
 {
 BAKER
 v.
 WALKER.

pears by the plea that it was given on account of the judgment debt, and probably on the supposition that it would suspend the remedy upon the judgment until the note became due and was dishonoured; but it would not suspend the judgment debt, or the remedy to recover it, for a single moment, more especially as it was not made negotiable, and it was therefore no consideration whatever for the defendant's promise. In *Green v. Harrington* (a), which was assumpsit for rent of a house and land upon a demise, on motion in arrest of judgment, it was urged "that no action lay upon this promise, but it is debt for the rent of land, and the assumpsit is of a less nature; as if one be indebted upon an obligation, and that being forfeited he promised to pay it, no action lies, for the debt is due upon the obligation;" which the Court agreed to. [Parke, B.—That case is distinguishable from the present, as that is the case of a mere promise, without any security. Would not the plaintiff, by accepting this promissory note, suspend his remedy upon the judgment for three months?] No, not in the present case, as the note was not made payable to order. It amounts to nothing more than a mere naked promise. In an anonymous case, 1 Cowp. 128, it was held, that a promise by a defendant to pay a judgment debt, in consideration that the plaintiff would stay execution thereon, would not support an action of assumpsit. Lord Mansfield, C. J., there says: "If the undertaking had been by a third person in consequence of the forbearance, it would have been a good ground of assumpsit against such third person. But here the promise is by the defendant himself, to pay a debt to which he was before liable upon record; and therefore I am of opinion that such promise is no ground upon which to raise an assumpsit." A mere parol agreement to give time to the principal does not discharge the surety *at law*.

(a) Hutton, 34, 35.

[*Parke*, B.—This is something more than a parol agreement—it is a security.] In *Davis v. Gyde* (a), it was held that a promissory note given by the tenant to his landlord for rent does not extinguish the claim for such rent, which is a debt of a higher nature than that arising upon the note; and that the receipt of such note did not of itself suspend the right of distress until the note was due. [*Parke*, B.—There was no averment there of any express agreement.] Nor is there here; and it is distinctly alleged in the plea that there was no other consideration for the making or delivery of the note. [*Parke*, B.—A promissory note given for the debt of a third person suspends the right of action, although no new consideration be given.—His lordship referred to *Lechmere v. Fletcher* (b).] In *Davis v. Gyde*, *Littledale*, J., says: “*Mease v. Mease* (c), and other cases which are there cited, serve to shew that you cannot plead a parol agreement to extend the time for the payment of a specialty debt:” and a fortiori a debt of record. [*Parke*, B.—But that does not shew the converse, that it being a debt due on a specialty, it is an answer to an action on a promissory note given for it. If I give a promissory note for the debt of a third person, I am bound to pay it when due. If that be so, I do not see why it is not a suspension of the remedy in the case of a specialty debt. The anonymous case cited from *Cowper* was that of a simple promise, without any security: but a promissory note is a security.] In this case the note was not negotiable, and was therefore no suspension of the action upon the judgment. In *Popplewell v. Wilson* (d), where it was held that a promissory note for the debt of another was within the stat. 3 Anne, c. 9, the note was evidently payable to order; but where it is not, it will not suspend the time of payment; and therefore

1845.
BAKER
&
WALKER.

(a) 2 Ad. & Ell. 623; 4 Nev. & M. 462.

(b) 1 C. & M. 623.

(c) 1 Salk. 325.

(d) 1 Stra. 264.

1845.
 BAKER
 v.
 WALKER.

the party giving the note gets no benefit from it, and there is no consideration for it. The plea is therefore a good answer to the action.

Hance, contra, was stopped by the Court.

PARKE, B.—I am of opinion that the plea is bad, for it shews there was a debt in existence on account of which the note was made, and that is sufficient to make the note good. It is like the case of a note given for a debt of a third party, which has been held to be a sufficient consideration. It was so held in *Popplewell v. Wilson*, and that principle has been acted upon in many other cases. A promissory note, although not a specialty, resembles a specialty, and at all events it is a security. Where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note. Here, there being a judgment debt, a promissory note is given for the amount of it, and that is evidence of an agreement to suspend the judgment until the note is due, which is a sufficient consideration to support an action on the note. This distinguishes the case from *Serle v. Waterworth* (a). I am therefore of opinion that the plea is bad, and that the plaintiff is entitled to judgment.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 4 M. & W. 9. The judgment in that case was reversed on error, in *Nelson v. Serle*, Id. 795, but the allegation that "there never was any other consideration for the note," had been omit-

ted by mistake in the briefs of the case in the Court below, and the latter court gave judgment on the assumption that there was no such averment.

1845.

Ex parte BUCKLEY in re CLARKE.

July 2.

The following case was sent by the Lord Chancellor for opinion of the Court of Exchequer:—

On the 31st of May, 1843, a fiat in bankruptcy was made against John Clarke, Richard Mitchell, Joseph Phillips and Thomas Smith, all of Leicester, in the county of Leicester, bankers and co-partners, carrying on business at Leicester aforesaid, and also at Lutterworth, in the said county of Leicester, and at Melton Mowbray, in the same county, and at Uppingham and Oakham, both in the county of Rutland, under the style or firm of Clarke, Phillips, & Smith: the said Richard Mitchell also carrying on, in his individual capacity, the business of a trader at Leicester aforesaid.

On the 2nd of June, 1843, the said fiat was opened in Birmingham District Court of Bankruptcy, before Mr. Commissioner Balguy, when the said J. Clarke, R. Mitchell, Phillips, and T. Smith, were declared and adjudged bankrupts; and on the same day, James Christie was appointed official assignee; and on the 22nd of June, 1843, Thomas Edward Dicey, Esq., Edward Allen, bookseller, John Sidney Crossley, bookseller, Robert Hawley, trader and grazier, and Thomas Ward, were duly chosen creditors' assignees of the estate and effects of the said bankrupts, and the said fiat is now in course of prosecution.

Before and at the date and issuing of the said fiat, R. Buckley, of Thurlaston, in the county of Leicester, was a bona fide holder for value of ten promissory notes amounting in value to £65, of them the said bankrupts, issued by them from their banking house at Leicester aforesaid.

Three of the said notes, being for £5 each, were (omitting

Messrs. J. C., R. M., J. P., and T. S., carrying on business as bankers, a promissory note in the following form was signed by R. M.:—
“ I promise to pay the bearer, on demand, five pounds, value received.”—“ For J. C., R. M., J. P., and T. S.”—
“ R. M.”—
Held, that the holder of this note had not a separate right of action against the party so signing, but that the firm were liable.

1845.
 {
 Ex parte
 BUCKLEY
 in re
 CLARKE.

the date, number, and name of the entering clerk) in the following form:—

“ *Leicester and Leicestershire Bank.* £5

“ I promise to pay the bearer, on demand, five pounds, value received.

“ For John Clarke, Joseph Phillips, &
 Richard Mitchell, Thomas Smith,

“ RICHARD MITCHELL.”

The other seven notes (with the like exception of date, number, and name of entering clerk) were in the following form:—

“ *Leicester and Leicestershire Bank.* £5

“ I promise to pay the bearer, on demand, five pounds here, or at Messrs. Williams, Deacon, Labouchere, Thornton & Co., Bankers, London, value received.”

“ For John Clarke, Joseph Phillips, &
 Richard Mitchell, Thomas Smith,

“ RICHARD MITCHELL.”

On the 17th of July, 1843, the said Robert Buckley exhibited a proof under the said fiat, and was admitted as creditor against the joint estate of the said bankrupt for the sum of £65, the amount of the said notes.

On the 22nd of June, 1844, the said Robert Buckley presented a petition to the Court of Review, thereby offering to withdraw his said proof against the joint estate, and praying to be at liberty to tender a proof under the said fiat, for the said debt of £65, against the separate estate of the said Richard Mitchell, and an order was made on the said petition, dated the 9th of July, 1844, by the said Court of Review, that the said Robert Buckley should be at liberty to withdraw his said proof against the said joint

ate, and be at liberty to tender such proof (if any) as he could establish against the said separate estate of the said Richard Mitchell, but the order was to be without prejudice to the question, whether he had any right of proof against the said separate estate of the said Richard Mitchell.

On the 12th of July, 1844, the said Robert Buckley exhibited a proof under the said fiat, and was admitted a creditor for the said debt of £65 against the said separate estate of the said Richard Mitchell.

On the 20th of July, 1844, the assignees under the said fiat presented their petition to the said Court of Review, alleging that, having regard to the form of the order, the said bankrupts became jointly bound to pay the debts mentioned therein, but that the said Richard Mitchell did not become separately bound to pay the same, and praying that the said proof against the said separate estate might be expunged; and by an order of the said Court of Review, made upon the said petition, on the 30th of July, 1844, the said Court ordered the said proof to be expunged accordingly. The said Robert Buckley, feeling himself to be aggrieved by the last-mentioned order, a special case was, at his instance, stated under the provisions of the Bankrupt Act, 1 & 2 Will. 4, c. 56, s. 3, by way of appeal to the Lord High Chancellor against the said order, and on the hearing of the said appeal, on the 14th of April, 1845, the Lord High Chancellor ordered that a case be stated for the opinion of the Barons of her Majesty's Court of Exchequer, upon the following questions:—

First, whether, if an action at law had, previously to the said fiat, been brought against the said Richard Mitchell separately, upon the three above-mentioned notes, by the said Robert Buckley, as the holder of the said notes, the said R. Mitchell would, upon the form of the said notes, have had a valid defence.

1845.
Ex parte
BUCKLEY
in re
CLARKE.

1845.
 Ex parte
 BUCKLEY
 in re
 CLARKE.

supported. The partner, in making the promise, is only an agent for the firm. Then does it bind him personally, or does it bind the firm? No doubt the instrument was intended to bind the firm; and as he had authority as a partner to do it, it had that effect. I think we must certify our opinion to the Lord Chancellor, that there was no separate right of action against Mitchell upon any of these notes.

ALDERSON, B., concurred.

PLATT, B.—I have no doubt that *Hall v. Smith* cannot be supported.

A certificate in accordance with the above decision was afterwards sent.

June 23.

REDMAN v. WILSON.

SAME v. HAY.

Where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, and in consequence shortly afterwards became leaky, and, being pronounced unseaworthy, was run ashore in

order to prevent her from sinking, and to save the cargo:—*Held*, that the insurers were liable for a constructive total loss, the immediate cause of the loss being the perils of the sea, although the cause of the unseaworthiness was the negligence in the loading.

ASSUMPSIT on a policy of insurance, dated the 7th July, 1841, upon a ship called the "Lord Wellington," on a voyage from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom; and by the contract the assurance was to commence at and from London, and was to continue during the ship's abode there, and until she should have arrived at or as aforesaid and there moored at anchor; and the perils insured against were, amongst others, "perils of the seas, men-of-war, fire, enemies, pirates, &c., barratry of the master and mariners,

“other perils, losses, and misfortunes” that had or come to the hurt, detriment, or damage of the said ship. The loss was averred to be, that whilst the said ship was proceeding and was on her said voyage, and was probably by the said policy, to wit, on &c., the said ship was exposed to the perils and dangers of the seas, and stormy and tempestuous weather, strained, broken, and damaged, and whilst she was upon her said voyage, to wit, on the day and year last aforesaid, by reason of the unloading and loading of certain goods and chattels in and out of the said ship, to be carried and conveyed therein for freight, and in the course and consequence of the said ship or vessel accidentally, and without personal negligence whatever of the plaintiff, became further strained, broken, and damaged, and the straining, breakage, and damage first-aforesaid thereupon came and was aggravated and increased. And, by reason of the premises, the said ship, after the shipment and loading of the said goods and chattels as aforesaid, during the continuance of the said voyage, became further strained, broken, leaky, and unseaworthy, and unfit further to proceed on her said voyage; and the said ship after, to wit, on the day and year last aforesaid, was *by and dangers of the seas, and other perils, losses, and misfortunes insured against* by the said policy, wholly lost, and never did arrive at London aforesaid; of all which the defendants, to wit, on &c., had notice.—

1.
It is first, that the said policy of insurance was obtained from the defendants, and they were induced to obtain the same, by and through the fraud, covin, and misrepresentation of the plaintiff; secondly, that at the time the said vessel departed and set sail from London, it was not seaworthy; and thirdly, that the said vessel was lost by the perils of the seas, or other perils or losses

1845.

REDMAN
&
WILSON.

1845.
 REDMAN
 v.
 WILSON.

insured against by the policy, strained, broken, damaged, or lost, modo et formâ.

Issue was taken upon the above pleas.

At the trial, before *Pollock*, C. B., at the London Sittings after Trinity Term, 1844, it appeared that the vessel arrived on her voyage outwards on the 2nd of September, 1841, and went up the river at Sierra Leone to an island called Tassel, where she began to load her homeward cargo on the 13th of September. It appeared, also, that it is usual for the natives to be employed in loading vessels; and it was suggested, and the fact probably was, that the vessel was injured in loading her cargo of timber on board. She came down the river to Freetown on the 7th of November, fully loaded. It was then found that she was leaking. A survey took place, and the opinion of the persons who examined her was that she could not prosecute her voyage. Part of her cargo was ordered to be discharged. On the following day there was a slight tornado; two anchors were out, but the vessel drifted two miles down the river. She was afterwards brought back, and part of her cargo was discharged; but the leak increased, and on a second examination she was pronounced unseaworthy, and she was run on shore to preserve the cargo, and to prevent her sinking in the river. She was ultimately sold as not being fit to repair, and the assured now claimed damages for a constructive total loss. The jury found, that the ship was seaworthy when she sailed from London; that there was no fraud in effecting the policy; and that the vessel was lost by perils of the sea; and they thereupon returned a verdict for the plaintiff on all the issues.

A rule was obtained in Michaelmas Term, 1844, calling upon the plaintiff to shew cause why there should not be a new trial, on the ground that the loss proved at the trial was not, in point of fact, a loss by the perils of the sea, but was the consequence of negligence or want of skill in the

ading the cargo on board the vessel ; and that the attention of the jury ought to have been directed to the negligent mode of loading, and they should have been told, that, if they thought the loss was the result of such negligence, the defendant was entitled to their verdict. Against the rule

1845.
 REDMAN
 v.
 WILSON.

Cervis, Martin, and Hoggins shewed cause, in the Vacation Sittings after last Hilary Term (Feb. 12).—In this case the underwriter was clearly liable. Even if the injury to the vessel were occasioned by the loading of it, when on being brought out in the smoothest water she ran at down, the underwriter would be liable, for it would be a peril insured against. The insurance on this vessel was from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom ; and she was therefore under the protection of the policy during the whole time. The rule is, that you must look at the proximate cause of the loss. Now it was proved in this case that the vessel had sustained severe weather whilst in the river, and that although two of her anchors were out, she drifted two miles down the river; and it was after that, upon a second examination, that she was pronounced to be unseaworthy, and she was obliged to be run on shore to prevent her from sinking. The proximate cause of the loss was therefore a peril of the sea. The vessel was totally lost when she was lying on the shore at Freetown, in a state in which it was impossible to repair her. But even if the loss were occasioned by the act of the natives employed in loading her, the underwriter would still be liable. It is perfectly clear that an injury occurring to a ship without the personal neglect of the assured, but occasioned by persons ordinarily employed in loading her, would be a peril insured against. The owners are bound to provide a sufficient crew and a captain of competent skill for the voyage (a),

(a) See the cases collected in Hildyard on Marine Insurance, p.110, et seq.

1845.
 REDMAN
 v.
 WILSON.

and, having done that, they are not responsible for performance of their duties, or for any neglect or conduct of the master or crew. Here the loss insured against are perils of the sea &c., barratry of master and mariners, and all other perils, losses, and fortunes. In *Dixon v. Sadler* (a), it was held by the Court of Exchequer, that the underwriters were liable for the consequences of the wilful (but not barratrous) act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard part of the ballast. And *Tindal*, C. J., in delivering the judgment of the Court of Exchequer Chamber, in the case (b), lays it down as an established rule, "that there is no implied warranty, on the part of the assured, for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage." That case decides that, if an accident happens to a ship in consequence of the act of the master and mariners, even though through negligence, the underwriter is liable—it is a peril insured against. But *Cullen v. Butler* (c) is a stronger case. It was held, that where a vessel was sunk at sea by another vessel firing upon her, mistaking her for an enemy, though not properly a loss by *perils of the sea*, the Court inclined to think, it was a loss within the policy, being a *peril*, loss, and misfortune, within the general scope of the policy, sustained in the course of her navigation upon the sea. So this was clearly a loss or misfortune happening to this ship in the course of her navigation on the sea. In *Devaux v. J'Anson* (d), where the ship was lost by an accident in going out of dock, and the policy covered perils of the seas, and all other losses, perils, and misfortunes, it was held to be a loss within the te

(a) 5 M. & W. 405.

(d) 5 Bing. N. C. 519;

(b) 8 M. & W. 895.

507.

(c) 5 M. & Selw. 461.

the policy. That case is analogous to the present. There it was averred that the loss was by the perils insured against in the policy: so it is averred here, that the said ship was, "by perils and dangers of the seas, and other perils, losses, and misfortunes, insured against by the said policy, lost, &c." So that whether the ship were lost by perils of the sea or negligence in the loading, both were losses by accidents during the voyage, for which the underwriters are liable. But, in truth, this falls within the averment of a loss by perils of the sea, for the loss occurred from the leakage of the vessel at Freetown, after the voyage homeward had commenced.

1845.
 REDMAN
 v.
 WILSON.

Watson, Tomlinson, and Forsyth, in support of the rule. —Assuming that the injury happened in the loading of the vessel, that was not a loss within the meaning of the policy. The words "other perils, losses, and misfortunes," mean matters ejusdem generis with the other words in the clause—such as fire, enemies, pirates, jettisons, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people, barratry of the master and mariners, &c. But no liability was incurred against for any accident or damage arising from the negligent conduct of the master or mariners, or persons whom they employed in loading the vessel, and the underwriters are not responsible for their acts. In *Watson v. Sadler*, it was decided that the underwriters were liable, not for the negligence, but for the consequences of the wilful act of the master and crew, not amounting to barratry. There is nothing to shew that the underwriters are liable for the negligent act, even of the mariners. [*Pollock, C. B.*—They may not be liable, unless it ends in a loss by the perils of the sea.] The insurance is against perils of the sea and losses ejusdem generis with perils of the sea. It has been said, that a loss by perils of the sea is ejusdem generis with barratry; but that is not so. The vessel remained a vessel in specie, with a

1845.
REDMAN
v.
WILSON.

partial loss, and the captain sells her as such. This is something clearly distinct from perils of the sea, and was not one of the perils insured against. [*Pollock*, C. B.—Do you admit, that, if the ship were rendered unsafe by the injury she sustained in loading her, and she afterwards put to sea and was lost, the underwriters would be liable?] That admits of another question, whether, sending the vessel to sea in such a state, she would be seaworthy.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action on a policy of insurance dated 7th July, 1841, on the ship “*Lord Wellington*,” on a voyage from London to Sierra Leone and back. The pleas were, first, fraud; secondly, that the vessel was not seaworthy; and thirdly, that she was not lost by the perils of the sea.

At the trial, the jury found all the issues in favour of the plaintiff; but a rule was granted in Michaelmas Term last, to shew cause why the verdict should not be set aside, and a new trial be had, on the ground that the loss which was proved on the trial was not, in point of fact, a loss by the perils of the sea, but was the consequence of negligence or want of skill in the loading the cargo on board the vessel. Cause was afterwards shewn, when the facts appeared to be shortly these. The vessel arrived on her voyage outwards the 2nd of September, and went up the river to Tassel (an island): she began to load her homeward cargo on the 18th of September. It is usual for the natives to be employed in loading, and it was suggested, and probably the fact was, that the vessel was in some degree injured, by loading her cargo of timber on board. She came down the river to Freetown on the 7th November, fully loaded. It was then found that she was leaking and was deep in the water. At this time she made

four feet and a half water in twenty-four hours. A survey was held, and the opinion of those who examined her was, that she could not prosecute her voyage. They ordered part of the cargo to be discharged. The following day there was a slight tornado; two anchors were out, but she drifted two miles down the river. She was brought back and part of the cargo was discharged, but the leak increased, and on a second examination she was pronounced unseaworthy, and she was run ashore to preserve the cargo, and to prevent her from sinking in the river; ultimately she was sold, as not being fit to repair, and the assured claimed for a constructive total loss.

The jury having found that the ship was seaworthy when she sailed from London, and that there was no fraud in effecting the policy, the only question discussed on the argument was, whether the loss was occasioned by the perils of the sea; and it was contended, on behalf of the defendant, that the attention of the jury ought to have been directed to the negligent mode of loading the cargo, and that if they thought the loss was the result of such negligence, the defendant was entitled to a verdict. But it appears to us that the rule "*causa proxima non remota spectatur*" applies to this case, and that the immediate cause of loss was a peril of the sea, for the stranding was a loss by a peril of the sea: and if it be said that it was voluntary, it was only to avoid the sinking of the vessel, which would have been a peril of the same sort. In *Walker v. Maitland* (a), (recognized and acted on in *Bishop v. Pentland* (b)), it was decided that the underwriters on a policy of insurance are liable for a loss arising *immediately* from a peril insured against, but remotely arising from the negligence of the master and mariners; and we cannot distinguish between the negligence of the master and mariners, and the negligence of the natives (if they were

1845.
 REDMAN
 v.
 WILSON.

(a) 5 B. & Ald. 171.

(b) 7 B. & Cr. 219; 1 Man. & Ry. 49.

1845.
 REDMAN
 v.
 WILSON.

negligent, and remotely gave occasion to the loss) who were employed to put the cargo on board.

It appears to us, therefore, that the rule for a new trial must be discharged : and the same with the other case, of *Redman v. Hay*.

Rule discharged.

July 9.

RICHARDS v. MACEY.

To an action by the indorsee against the maker of a promissory note, the defendant pleaded, that he made the note and indorsed it to the London and Westminster Bank, as a collateral security for certain advances made or to be made to the Marylebone Bank, upon the terms, that if those advances should be repaid before the note became due, the defendant should not be called upon to pay it. The plea then averred, that the advances so made were repaid before the note became due ;

that he had no value for his indorsement ; and that the note was indorsed to the plaintiff after it became due. Replication, *de injuriâ* :—*Held*, that it was an essential allegation, without which the plea must fail, that the advances were repaid before the note became due : and therefore that it was a misdirection, for the judge, on the trial of this issue, to tell the jury, that if the note was given as a part security for the advances so made to the Marylebone Bank, the defendant was entitled to a verdict.

ASSUMPSIT by the plaintiff as indorsee, against the defendant as maker, of a promissory note, dated 3rd July, 1841, whereby the defendant promised to pay to himself or order, £100, six months after date, indorsed by the defendant to the London and Westminster Bank, and by them to the plaintiff. There were also counts for money had and received, and on an account stated.

The defendant pleaded (*inter alia*), fourthly, that he made the said note, and indorsed the same to the London and Westminster Bank, as a collateral security for certain pecuniary advances before then made or to be made by the London and Westminster Bank to the Marylebone Banking Company, on the terms, that if the advances so made by the London and Westminster Bank should be repaid by the Marylebone Banking Company before the said note became due and payable, the defendant should not be called upon to pay the amount of the said note. The plea then averred, that the advances so made by the London and Westminster Bank were repaid to them before the note became due ; that he, the defendant, had never re —

red any consideration or value for his said indorsement reof; and that the said note was indorsed to the plaintiff after it became due.

The fifth plea alleged, that the defendant made and indorsed the note for the accommodation of the Marylebone Banking Company, without having any consideration or value for his said indorsement; and that it was indorsed to the plaintiff after it became due.

In replication to each of these pleas, *de injuriâ*, on which the defendant was joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sessions after last Hilary Term (*a*), the following facts were proved:—In the year 1841, the Marylebone Joint Stock Banking Company (which had been established since 1836) fell into embarrassments, and applied to the London

Westminster Bank for advances to relieve them from their difficulties. The London and Westminster Bank accordingly advanced them the sum of £10,000; the defendant, who was a shareholder in and director of the Marylebone Bank, thereupon signed the promissory note in question, amongst others. The plaintiff's case was, that the notes were given in order to assist the Marylebone Bank, and in respect of the general balance due to the London and Westminster Bank; the defendant's case was, that they were given as a part security for the repayment of the £10,000, with the understanding that the makers would not be called upon to pay the amount, if the £10,000 were repaid before the notes fell due, and that the repayment had been so made. On these points the evidence was in some degree conflicting. It appeared, however, that, at the time when the note on which this action was brought became due, the London and West-

1845.

RICHARDS
v.
MACET.

(a) This was the second trial of the cause. On the first trial, the plaintiff had a verdict, but a new trial was subsequently granted,

with liberty to the defendant to amend the fourth plea, which however was not done.

1845.
 RICHARDS
 v.
 MACEY.

minster Bank was in advance to the Marylebone Bank to the extent of £760. The Lord Chief Baron, in summing up, stated to the jury, that, if the note was given in order to assist the Marylebone Bank beyond the amount of the £10,000, the plaintiff was entitled to recover; but that if it was given as a collateral security for the £10,000, the fourth plea was substantially made out, and the defendant was entitled to the verdict. The jury found for the defendant on the fourth and fifth issues, and for the plaintiff on the other issues.

In Easter Term, *Jervis* obtained a rule nisi for a new trial, on the ground of misdirection; against which

Martin, *Barstow*, and *Wordsworth*, shewed cause in Trinity Term (May 26), and contended that the pleas were proved in substance, or at least that there was evidence to go to the jury in support of them, and that the direction of the learned Judge was substantially correct; for that the material question in the cause was, whether these notes were given to the Marylebone Bank as *capital*, to be negotiated and enforced against the makers, or whether they were merely collateral securities for the £10,000 advanced by the London and Westminster Bank: and that there was evidence to shew that the notes were sent back to the attorney for the Marylebone Bank as satisfied.

Jervis and *Butt*, contra, insisted that the jury had been misdirected, with respect to the fourth issue, in not being told that the plaintiff was entitled to the verdict, unless they found the allegation to be proved (which was a material part of the plea), that the £10,000 had been repaid before the note became due; which, upon the state of the account, it was clear was not the case: and that, with respect to the fifth issue, the allegation that the note was given for the accommodation of the Marylebone Bank (which also was a material part of that plea) clearly was

It proved; for an accommodation note meant a note for which the payee undertook to provide when due, the maker by lending his name; whereas this note was unquestionably given, in either view of the case, with the intention that it should be negotiated and made available against the maker of it.

1845.
 RICHARDS
 v.
 MACEY.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case, we think there should be a new trial. The question turns upon the fourth and fifth pleas, upon which the verdict was found for the defendant. The first is sufficient, as to the fifth plea, to say, that there was no evidence that the promissory note was made and delivered to the defendant for the accommodation of the Marylebone Bank, which is an essential averment.

As to the fourth plea, the difficulty is this. That plea avers, that the note was delivered as a collateral security to the London and Westminster Bank, for certain pecuniary advances made by them to the Marylebone Bank, and on the terms, that if the said advances should be paid before the note became due and payable according to its tenor and effect, the defendant should not be called upon to pay its amount when due. The plea then avers, that the said advances were accordingly repaid before the note became due, and proceeds to aver that the note, after it became due, was indorsed over to the plaintiff by the London and Westminster Bank.

Now we think that this question, whether the advances in respect of which the promissory note was deposited as a collateral security were repaid to the London and Westminster Bank before the promissory note became due, has not been distinctly left to the jury, and found by them, and that on this ground there should be a new trial. It is a material part of the plea; and, if not found by the jury, the plea, as now framed, must fail.

1845.
 RICHARDS
 v.
 MACEY.

We do not consider the question, how the plea, if amended, would stand as to proof, for we think no amendment ought to be made. At the time of granting the former new trial, the Court gave the defendant liberty to amend, which liberty the defendant has not availed himself of, and we think it is now too late for him to do so. All amendments should be ascertained at *Nisi Prius*, and reduced, if possible, into writing, before the case goes to the jury; because it is upon the amended record that their verdict is to be given. If this is not done, the jury should be directed to find certain facts specially, upon which the Court may afterwards, at their discretion, proceed. Unless one or other of these courses be taken, much ambiguity and consequent inconvenience will be the result.

We think there must be a new trial.

Rule absolute.

July 9.

GILBERT v. SCHWENCK and Wife.

Where two persons are appointed joint testamentary guardians of an infant, under 12 Car. 2, c. 24, s. 8, trespass lies by one of them against the other, for forcibly removing the infant from the lawful service of the former, against his consent.

TRESPASS.—The declaration stated, that the defendants, on &c., assaulted one F. S. Gilbert and one J. Gilbert, then being the sons and servants of the plaintiff, and forcibly and with violence took away and removed them from the plaintiff, and kept them so removed for a long space of time, to wit, from thence hitherto; *per quod servitia amisit, &c.*

The defendants pleaded, that long before the said time when &c., the plaintiff married one J. M. Gilbert, since deceased, and that the said F. S. Gilbert and J. Gilbert were the lawful issue of that marriage. The plea then stated, that, by a codicil to the will of J. M. Gilbert, he willed and directed that William Gilbert should be a guar-

dian of the said F. S. Gilbert and J. Gilbert, "with a certain person therein in that behalf named," and did thereby dispose of the custody, governance, and tuition of the said F. S. Gilbert and J. Gilbert, to the said William Gilbert and the said other person, in possession, &c. The plea then alleged the death of J. M. Gilbert, without revoking his will, and the acceptance of the trust by William Gilbert, whereby he became lawful guardian, with the said other person, of the said children; and it then stated, that the children were under the age of eight years and above the age of four, and were in the custody of the plaintiff as such servants as in the declaration mentioned, and that she had them in her custody without the license or consent and against the will of the said William Gilbert, who was desirous of having the care, custody, &c. of them. The plea then averred a request by the defendants, as servants of William Gilbert, to the plaintiff, to deliver up the children to William Gilbert, the refusal of the plaintiff, and the removal by the defendants of the children, by command of William Gilbert, that he might have the care, custody, &c. of them.—Verification.

Replication, that, by the said codicil, the said William Gilbert was appointed joint guardian with the plaintiff during her life or widowhood, the plaintiff being the said "other person" in the said codicil named; and that the plaintiff accepted the said trust, and had continued unmarried, &c.—Verification.

Special demurrer, and joinder in demurrer.

In Trinity Term (May 28),

Jervis argued in support of the demurrer.—This replication is bad, both on the ground of departure from the declaration, and also for not alleging that which is necessary to found the right of the plaintiff to complain of the trespass as the testamentary guardian of the infant. But, in the first place, no action will lie by the testamentary guar-

1845.
GILBERT
v.
SCHWENC

1845.
 GILBERT
 v.
 SCHWENCK.

dian against the defendants, for taking out of her custody a child, in which the party by whose authority they acted had, as co-guardian with her, a joint interest. It is like the case of joint-tenants of a chattel. *Donaldson v. Williams* (a) is in point. There it was held, that one of two partners, joint-tenants of a house in which they carried on their joint business, had a right to authorize a joint weekly servant to remain in the house, although the other partner had regularly given him a week's notice to leave the service. But further, here the *declaration* is founded upon the fact of the children being the *servants* of the plaintiff, and upon a trespass per quod servitium amisit. The defendants justify the trespass under their testamentary guardian; to which the plaintiff replies, that she is so also. That is a departure from the declaration: her being their guardian does not make her their mistress. There is no question here as to her right to have the custody of them for the purpose of nurture, or of any parental right. [*Platt, B.*—Is not the plea bad?] No; for the stat. 12 Car. 2, c. 24, s. 8, gives to the testamentary guardian a positive control over the infant after the father's death, although the Courts, in their discretion, have said that they will not remove it out of the custody of the mother within a certain age. Upon the plea, it must be taken as if the plaintiff were not named as a guardian in the will at all. The plea in effect says, the infants were in the service of the plaintiff without the license of William Gilbert as their testamentary guardian, and the defendants took them away by his authority. Then the plaintiff, in her replication, claims them in the same character: and it does not even say that she had the possession of them as her wards; but merely that she also is testamentary guardian. The action under the statute, as guardian, is quite different from the present; and there the damages go to increase the estate of the

(a) 1 C. & M., 345.

child. But when she comes into conflict with the co-guardian, she cannot, as against him, assume the character of *mother*, and therefore *mistress*. Littleton says expressly . 323), "Where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time."

1845.
GILBERT
v.
SCHWENCK.

Peacock, contra.—The plea is bad in substance. This action is brought in right of the plaintiff's character as *mistress of servants*—not merely as *mother*, nor as *guardian*. It is only on this ground that the mother can sue for an injury to her child; the declaration therefore alleges a loss of service. The plea admits they were her servants; but so, the testamentary guardian cannot take an infant out of the custody of its *master* or *mistress*, and so destroy the contract of service. Suppose the case of an infant of the age of eighteen or nineteen, with no provision under his father's will, who has bound himself apprentice to a trade: can his uncle, who may have been appointed his testamentary guardian, take him out of his master's custody, and prevent his earning his wages? [*Pollock*, C. B. —The question is, whether an infant can make a contract of service which shall prevent the right of custody of the guardian under the act of Parliament.] Suppose the co-guardian seduced the infant daughter while living with her mother, surely she might sue him for the seduction; yet she cannot, unless the infant could make a good contract of service with her. In *Rex v. The Inhabitants of Chillesford* (a), it is laid down that an infant may bind himself apprentice to a stranger without the concurrence of his father, and thereby gain a settlement. But here the attempt is made by one of the testamentary guardians to de-

(a) 4 B. & Cr. 94.

1845.
 GILBERT
 v.
 SCHWENCK.

stroy the infant's contract, whereas it is only *the two* guardians who represent the father. Then, as to the alleged departure, the replication sufficiently supports the declaration, which shews the action to be brought by the plaintiff in the character of mother and mistress, whilst the replication merely shews that the contract of service was entered into with the consent of the other testamentary guardian, namely, the plaintiff herself.

Jervis, in reply.—It is admitted on the other side that this declaration is not founded upon any right of guardianship, but upon a supposed contract of service. Then the plea is, that that contract was entered into without the consent of the testamentary guardian. That is a sufficient answer; for an infant cannot disentitle his guardian to his statutory right, by making a private contract of service with a third party. He may, indeed, as in *Rex v. Chillesford*, contract for his own benefit, and so acquire a settlement, and the assent thereto of the father will be presumed till the contrary appears. But such a contract is not valid to prevent the dissenting testamentary guardian from intervening. The *two* stand in loco parentis. The remedy of the master, if any, must be against the one who consented to the contract. If one guardian can, as is expressly said by Littleton, take the infant out of the possession of the other, and no action lies, no action also can lie by the party who is the master with consent of the other guardian. But here, in her replication, the plaintiff assumes a new character. [*Rolfe*, B.—No; she is not going on her title as guardian, but only shewing why the facts alleged in the plea do not destroy her title as mistress, because she says the contract of service was made with the consent of the co-guardian.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PLATT, B.—[His lordship stated the pleadings, and continued:]—The question raised upon this demurrer is, whether William Gilbert, by reason of his having been united with the testator's widow in the testamentary guardianship of infant children, the issue of her marriage with her deceased husband, could legally remove, against her will and during her widowhood, those children from her custody and service. The solution of this question depends upon the nature of the power which, at the time of the alleged trespass, vested in William Gilbert by virtue of his appointment of joint guardian.

1845.
GILBERT
v.
SCHWENCK.

Guardians appointed by will, according to the statute of 12 Car. 2, c. 24, have no more power than guardians in socage, and are but trustees. This doctrine is recognized in *The Duke of Beaufort v. Berty (a)* and *Frederick v. Frederick (b)*. But one of two joint trustees cannot act in the trust in defiance of the will of the other; each has an equal power. It seems to follow, that as the children were in the custody of the plaintiff, and in a service which, upon these pleadings, must be taken to have been in its nature lawful, the defendants, as the servants of William Gilbert, were not justified in removing them against the plaintiff's will.

It is unnecessary to discuss the effect of the plaintiff's being, in the absence of any appointment of testamentary guardian, the natural guardian of the infants. We think that, upon the pleadings, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) 1 P. Wms. 703.

(b) Id. 721.

1845.

July 9.

HOGARTH v. PENNY and Another.

In replevin, the defendants avowed for a distress under an annuity deed; which recited that F., who was the beneficial lessee of certain salt-works, in order to raise money for carrying them on, had contracted with K. to grant him an annuity of £1050, in consideration of £14,500,

and that K., being unable to provide the whole sum himself, had entered into sub-contracts with seven other persons to take portions of the annuity, each advancing a part of the consideration money; and, after reciting all these contracts, and the payment by the different parties of their respective proportions of the £14,500, the deed contained a grant by F. to C. and D. of several annuities, making together an annuity of £1050, in trust for the several persons advancing the money, with the usual powers of distress. The avowry then set out two other deeds, one of which C., and by the other of which S., a trustee nominated in D.'s place under 1 Will. 4, c. 60, assigned "the said several annuities" to the defendants, who then avowed taking for a distress in respect of one of the annuities in arrear. There were similar avowries in respect of others of the annuities. The plaintiff pleaded in bar, first, non est factum; secondly, that C. did not assign "the said annuity" modo et formâ; thirdly, that D. was not a trustee within the 1 Will. 4, c. 60; fourthly, that S. did not assign the annuity modo et formâ; lastly, (after craving oyer of the annuity deed), that no memorial was duly enrolled. The defendants joined issue on the first four pleas, and to the fifth replied, that the memorial was enrolled; setting it out. The plaintiff rejoined, that the memorial contained certain misstatements as to the parties beneficially interested, and the pecuniary considerations for the annuities. The defendants surrejoined, that the memorial did truly state the names of the persons by whom the several annuities were to be received, and the pecuniary consideration granting the same: on which issue was joined:—*Held*, first, that the annuity deed only required a stamp in respect of the aggregate sum paid to F. for the annuity of £1050, and that it was not to be the aggregate of the stamps required on each of the several annuities into which it was divided.

Secondly, that, if there was a variance in stating in the avowries that C. and S. assigned "the said annuity" to the defendants, whereas the legal effect of each of the assignments was to convey a moiety only, this was a defect which ought to be amended at Nisi Prius.

The memorial, in the column headed "Consideration, and how paid," first set forth the sums paid by the several sub-purchasers to K., for their several annuities, and then stated the sums paid by K. to F., which it described as composed of £7500 paid by K. as the consideration for his own share of the annuity, and of the other sums paid to K. by the sub-purchasers as before mentioned. In the former part of the column there were some inaccuracies in the statement of the manner of payment; but the latter part correctly stated the payments to F.: *Held*, that the memorial was sufficient.

Semble, that the onus of proof, upon the issue relating to the memorial, was upon the plaintiff; for that the memorial would be taken to be correct till the contrary was shewn.

REPLEVIN, for taking, at the "Wharton Patent Salt Works," in the county of Chester, five hundred tons of salt, the property of the plaintiff.

The first avowry stated, that one William Furnival, being possessed of the said salt works and furnaces, by a deed of annuity, of ten parts, dated the 19th of April, 1830, made between the said William Furnival of the first part, Milesian Kymer of the second part, Levi Ames, James Brotherton, Thomas William Claggett, Charles Chatfield, John Dear, Thomas Nash Kemble, Christopher Kymer, Francis Kemble, and Frederick Lock, of the several other parts respectively,

ively, did give and grant to the said Francis Kemble and Frederick Lock, in trust, their executors, administrators, and assigns, one annuity of £100 for ninety-nine years, if certain parties therein named should so long live, to be paid quarterly, with a power of distress to them, if the annuity should be in arrear for twenty-one days; that, by an indenture of the 6th October, 1840, Lock assigned to the defendants "the said annuity or yearly sum of £100, and all powers and remedies for securing and obtaining payment thereof:" that an order in Chancery was made, that Henley Smith should, in the place of Kemble, who was a trustee within the meaning of the statute 11 Geo. 4 & 1 Will. 4, c. 60, and then out of the jurisdiction of the Court, assign, or join Lock in assigning, the said annuity of £100 to the defendants; that the said H. Smith did accordingly, by another indenture of the 28th of April, 1841, assign and set over to the defendants, amongst other things, "the aforesaid annuity or yearly sum of £100, and all powers and remedies for securing and obtaining payment thereof." Averment, that 18*l.* 8*s.* 5*d.*, part of the said annuity, was in arrear. The second, third, fourth, fifth, and sixth avowries were similar to the first, except that they avowed for the taking of a distress in respect of five other similar annuities of £35, £50, £70, £140, and £515 respectively, payable by the plaintiff to certain parties therein named, and assigned to the defendants in trust, as above mentioned.

The plaintiff pleaded to the first avowry, first, as to the deed of the 19th of April, 1830, non est factum; secondly, that Lock did not assign the said annuity to the defendants, modo et formâ; thirdly, that Kemble was not a trustee within the meaning of the said act of Parliament; fourthly, that Henley Smith did not assign the said annuity to the defendants, modo et formâ; fifthly (after setting out the annuity deed of the 19th of April on oyer),

1845.
HOGARTH
v.
PENNY.

1845.
 HOGARTH
 v.
 PENNY.

that no memorial of the said annuity was inrolled in Chancery, as required by the statute. Similar pleas were pleaded to each of the other avowries.

The defendants replied, joining issue on all the pleas except the fifth, tenth, twentieth, twenty-sixth, and thirtieth, which related to the memorial; and as to those they replied, that a memorial was duly inrolled, setting forth a copy thereof. The plaintiff rejoined, that the memorial inrolled did not truly state the names of the person and persons by whom the said annuities or yearly sums were to be beneficially received, and the pecuniary consideration for granting the same, but on the contrary thereof, the memorial, so far as the same related to the said annuity of £100, was and is false and untrue in this, to wit, that the said James Brown, in the said memorial mentioned, was not nor is the only person by whom the said last mentioned annuity was to be beneficially received, nor was the sum of £1000, in the memorial mentioned, the consideration for the grant by the said William Furnival of the said annuity; nor was the consideration for such grant paid in a note or notes of the Governor and Company of the Bank of England to the said M. R. Kymer. The other rejoinders contained similar averments as to the annuities of £35, £50, £70, £140, and £515, respectively. Surrejoinder, that the memorial, so as aforesaid inrolled in Chancery, did truly state the name and names of the person and persons by whom the annuities were to be beneficially received, and the pecuniary considerations for granting the same; concluding to the country; and issuing thereon.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after Michaelmas Term, 1844, the following facts appeared:—The plaintiff was the manager of the Wharton Salt Works, in Cheshire, which were in the occupation of the National Patent Salt Company. The defendants were true

tees for the parties beneficially entitled to certain annuities charged upon the said salt works, and the distress in question was levied for the arrears of the annuities due up to the 12th of January, 1844. In the year 1830, Maximilian Richard Kymer contracted with William Furnival, the original grantor of the annuities, for the purchase of an annuity of £1050, and for a lease of a portion of the Wharton Salt Works, then held by Furnival, of which the consideration was agreed to be £14,500, £500 of it being the consideration for the lease, and the residue the consideration of the annuity. Kymer, being unable to provide the whole of the money, applied to several persons to take parts of the annuity, and find proportionate parts of the purchase-money; and it was ultimately arranged that Furnival, instead of granting an annuity of £1050 to Kymer, should grant eight several annuities of £70, £100, £35, £50, £70, £70, £140, and £515, to Messrs. Kemble and Lock, in trust, on receipt thereof, to pay the same to Clagett & Pratt, who were trustees for the several parties with whom Kymer had contracted. This was done, and a memorial, of which the following (so far as it is necessary to state it in this case) is a copy, was duly inrolled in Chancery:—

1845.
 HOGARTH
 v.
 PENNY.

The annuities in question were duly paid by Furnival for several years, until he became insolvent; and his assignees sold his interest in the lease and premises on which the annuities were charged, to the "National Patent Salt Company." In the year 1840, the defendants were appointed trustees for the annuitants, in the room of Messrs. Kemble and Lock. Accordingly, Lock, by a deed dated 6th December, 1840, assigned his interest to the defendants. The terms of this deed purported to pass the *whole* of the annuities, not an undivided moiety only: and by another deed, dated 28th April, 1841, Mr. Henley Smith (having been duly appointed, by an order of the Court of Chancery made under the 1 Will. 4, c. 60, to assign for Kemble, who was then in Australia) assigned to the defendants Kemble's interest in the annuities, in the same terms. The annuities continued to be paid to the defendants by the National Patent Salt Company until the end of the year 1843, when they refused, in consequence of the alleged insufficiency of the memorial, to make any further payments in respect of them. In consequence of such refusal, the distress was taken out of which this action arose.

The annuity deed, when produced in evidence at the trial, bore a stamp of £130, being the amount required by the Stamp Act for an annuity of £1050.

The Lord Chief Baron ruled, after argument, that on these pleadings the defendants were bound to begin; it being agreed, that, if the Court should be of a contrary opinion, the parties should be in the same situation as if no evidence at all had been given. The defendants accordingly began, and proved the facts above stated.

For the plaintiff, three objections were made. First, that the annuity deed was not duly stamped; for that the grant thereby made to each of the annuitants was to be considered as a separate and distinct transaction, and the deed ought therefore to have borne several stamps in re-

1845.
HOGARTH
v.
PENNY.

1845.
 HOGARTH
 v.
 PENNY.

spect of each, amounting in the whole to £160. Second, that the plaintiff was entitled to a verdict on the second and fourth pleas, on the ground that, although the assignments, on the face of them, purported to be assignments of the whole annuity, yet as Lock and Kemble were joint-tenants of the annuity, the legal effect of each of the deeds of assignment was to dispose of one moiety thereof only, and therefore the pleas were proved. On the same ground the verdict was claimed for the plaintiff also on the third plea, that Kemble was not a trustee of the annuity. The learned Judge offered to amend the avowries (subject to the opinion of the Court as to the propriety of such amendment), by stating the assignments to have been assignments of the moieties only, and Kemble to be trustee of a moiety only; but the defendants' counsel declined to amend, insisting that no amendment was necessary. Thirdly, it was objected that the memorial was invalid; that the consideration of the annuity, and the names of the parties beneficially interested, were not properly stated in it, there being a variance between the mode of stating them in the memorial, and the statement in the annuity deed. The Lord Chief Baron reserved the two latter points for the consideration of the Court, and the defendants had a verdict, with liberty to the plaintiff to move to enter a verdict for him on such of the issues as the Court should think fit: the question as to the propriety of the amendment being also reserved.

In Easter Term, *Jervis* obtained a rule nisi pursuant to the leave reserved, or for a new trial, on the ground of the insufficiency of the stamp: against which, in Trinity Term (May 23),

E. V. Williams and *Couch* (*Kelly* with them) shewed cause.—First, it was erroneously ruled at the trial that the defendants were bound to begin. The onus of proving the memorial to be false lay upon the plaintiff. Surely it

grantee of an annuity is not to have the burden thrown upon him, at any distance of time, to prove that the memorial is true. It is supposed to be correct till the contrary is shewn. It is true the affirmative, in point of form, lay upon the defendants; but that is not the test. It is like the case of an action upon a bill or note, where the issue is upon the consideration; there, although in terms the affirmative of the issue would be upon the plaintiff, yet it is for the defendant to shew by evidence that there was no consideration. [*Alderson*, B.—Must not the defendants begin on non est factum, in order to prove the deed?] If there be any issue on the plaintiff, he must begin. [*Alderson*, B.—That rule does not apply to replevin. Suppose no evidence at all were given, for whom would be the verdict? The defendants avow the taking under the deed, and they must prove their averment. The plaintiff denies a material part of their avowry, and therefore they must prove it. Whether the defendants were bound to give any evidence on this particular issue, is another question. The object of the statute is only that the consideration may be stated, so that it may be detected if untrue. The words of the act (53 Geo. 3, c. 141, s. 2) are observable; it does not say that a *true* memorial shall be inrolled, but only “a memorial;” that is, it requires the party to state the consideration of the annuity in a manner by which he may afterwards be bound. It would certainly be very inconvenient if it were otherwise. These pleadings point out particular untruths in the memorial: now, if the issue be on the defendants, they must prove the whole of the memorial to be true, and those particular matters are immaterial parts of the issue.] In *Doe d. Griffin v. Mason* (a), Lord *Ellenborough*, C. J., ruled, that, in ejectment on the assignment of a term to secure an annuity, a proper memorial of the annuity deeds would be presumed, until the contrary were shewn.

(a) 3 Campb. 7.

1845.
HOGARTH
v.
PENNY.

1845.
 HOGARTH
 v.
 PENNY.

The first question raised by this rule is as to the sufficiency of the stamp of £130 on the annuity deed. That depends on the language of the Stamp Act, 55 Geo. 3, c. 184, sched., Part 1, title "Conveyance:"—"Where any lands or other property, contracted to be purchased by two or more persons jointly, or by any person for himself and others, or wholly for others, at one entire price for the whole, shall be conveyed in parts or parcels, *by separate deeds or instruments*, to the persons for whom the same shall be purchased, for distinct parts or shares of the purchase-money, the principal or only deed or instrument of conveyance of each separate part or parcel shall be charged with the ad-valorem duty in respect of the sum of money therein specified as the consideration for the same. . . . But if separate parts or parcels of such lands or other property shall be conveyed to, or to the use of, or in trust for different persons, in and by *one and the same deed or instrument*, then such deed shall be charged with the ad-valorem duty in respect of the *aggregate amount* of the purchase or consideration monies therein mentioned to be paid or agreed to be paid for the lands or property thereby conveyed." This is a grant by Furnival of the original annuity of £1050, in separate portions, by one deed, in fulfilment of the arrangement therein mentioned; and the original consideration is not altered. The case falls, therefore, within the latter of the above classes. The principle of the act seems to be, that where, out of a single contract, separate properties are created by one conveyance, the duty is payable only on the aggregate sum which is the consideration for them all; but that where the parties choose to have a separate deed for each property, it is otherwise. Even if there be any doubt or ambiguity in the language of the act, it must be construed in favour of the subject. The clause just cited, undoubtedly, does not precisely hit the present case, because in terms it applies only where the contract is *originally* made

by A. on behalf of himself and others. But here the transaction amounted to a new contract with Kymer for these several annuities, before the execution of the conveyance, and then Kymer became a person contracting on behalf of himself and others for the purchase of the different annuities, making up altogether the annuity of £1050. It may be granted that the stamp is to be imposed on the second consideration; but it is upon the *aggregate sum*.

Secondly, with respect to the averments of the assignments by Lock and Kemble, the objection taken is, that the avowries state those assignments according to their actual form, instead of their legal effect, and so that there is a variance. This might possibly be a good objection on special demurrer; but after pleading over, the averment will be understood in the manner which will support and give efficacy to the whole of the pleadings; that is, it will be construed according to its legal effect, as a conveyance of a moiety only: *Bushell v. Bevan* (a). The averment now means, that each of these persons bargained and sold according to his interest, which, on the face of the avowries, appears to be in a moiety only. But if this be at all doubtful, the Court will give leave to amend the pleadings, pursuant to the leave reserved. [*Alderson, B.*—Surely the Court will grant an amendment, if there be anything in the objection.]

Thirdly, the memorial is sufficient (assuming that the onus was upon the defendant to prove it so). The key to its proper construction consists in separating the first six clauses from the last clause, in the column headed "Consideration, and how paid." The first six clauses have reference to Kymer and the different parties with whom he had made the arrangement for the division of the annuity into portions, and state how *those* considerations were paid. Then the last clause describes how *the whole* consideration was paid by Kymer to Furnival, by referring to

1846.
HOGARTH
v.
PENNY.

(a) 1 Bing. N. C. 119; 4 M. & Scott, 622.

1845.
 HOGARTH
 v.
 PENNY.

the previous payments by the sub-contractors to Kymer. [Pollock, C. B.—Both are stated, and both are true.]

Jervis, Watson, Peacock, and Manisty, in support of the rule.—First, this transaction amounted to a grant of several distinct annuities, and a separate stamp was therefore required in respect of each. The clauses of the Stamp Act referred to on the other side do not apply to this case; because here the title of the annuitants arises, not under the original contract, but under the several sub-contracts. Suppose Kymer had contracted to sell again for more than the original consideration, would there not have been an ad valorem duty payable on the larger amount? The interests of these sub-purchasers are altogether several. They have no privity whatever with Furnival. The case falls rather within the subsequent class mentioned in the act:—"Where any person, having contracted for the purchase of any lands or other property, but not having obtained a conveyance thereof, shall contract to sell the whole or any part or parts thereof, to any other person or persons, and the same shall in consequence be conveyed by the original seller to different persons in parts or parcels, the principal or only deed or instrument of conveyance of each part or parcel thereof, shall be charged with the ad valorem duty in respect only of the purchase or consideration money which shall be therein mentioned to be paid or agreed to be paid for the same by the person or persons to whom, or to whose use, or in trust for whom the conveyance shall be made, *without regard to the amount of the original purchase-money.*" That applies equally where several persons have taken several interests by the same deed, as where there are separate conveyances to each of them. The language of *Parke, B.*, in *Lane v. Drinkwater (a)*, is in point to shew that these are several and distinct annuities, in which each of the parties has a separate interest.

(a) 1 C. M. & R. 612.

Secondly, there is a variance between the avowries and the evidence; for the assignments are pleaded in the avowries as assignments of the whole annuity, whereas they were in fact assignments of a moiety of the annuity only, the assignees being joint-tenants of the annuities, and each being entitled to a moiety only. The deed ought to have been pleaded according to its legal effect. Nor can this be aided by pleading over, an express issue being taken upon it. The defendants failed to prove that Lock or Kemble assigned the annuity as alleged in the avowries, and this issue ought therefore to be determined in favour of the plaintiff. And the Court will not allow an amendment in this case, because it would materially prejudice the plaintiff; for if the deed had been correctly pleaded according to its legal effect, he might have rested his case upon the ground that the deed pleaded required a memorial to be inrolled, and that there was no memorial.

Lastly, the memorial proved was untrue, and therefore the deed was void. [They then proceeded to point out several instances in which the statements in the memorial, as to the mode of payment by the sub-purchasers to Kymer, were at variance with the facts proved.] [*Alderson, B.*—The substance of the transaction is the manner in which the consideration was paid to Furnival, and that is truly stated in the memorial.] On this part of the case the learned counsel referred to *The Duke of Bolton v. Williams* (a), *Hood v. Burlton* (b), *Berry v. Bentley* (c), *Poole v. Cabanes* (d), *Morris v. Wall* (e), and *Gibbs v. Hooper* (f). They contended also that upon this issue the onus of proof was on the defendants, who were bound to prove the inrolment of such a memorial as was required by the act of Parliament.

Cur. adv. vult.

(a) 4 Bro. C. C. 297.

(b) 2 Ves. jun. 29.

(c) 6 T. R. 690.

(d) 8 T. R. 328.

(e) 1 Bos. & P. 208.

(f) 9 Sim. 89.

1845.
HOGARTH
v.
PENNY.

The judgment of the Court was now delivered by

ROLFE, B.—This was an action of replevin. The defendants avowed for a distress under an annuity deed, dated the 19th of April, 1830. It appears, by the recitals in the deed, that William Furnival, who was the beneficial lessee of certain salt works, in order to raise a large sum of money for the purpose of carrying them on, contracted with Maximilian Richard Kymer to grant him an annuity of £1050, in consideration of £14,500, and that Kymer, being unable to provide the whole sum himself, entered into sub-contracts with seven other persons to take portions of the annuity, each advancing a part of the consideration money. The deed, after reciting all these contracts, and reciting full payment by the different parties of their respective shares of the £14,500, contains a grant by Furnival to Francis Kemble and Frederick Lock, of eight several annuities, making together an annuity of £1050, in trust for the several persons advancing the money, with the usual powers of distress. The first avowry, after stating this deed, sets out another deed of the 6th of October, 1840, whereby Frederick Lock, one of the trustees, is stated to have assigned to the defendants one of the eight annuities; and the avowry then, after stating certain proceedings in Chancery under the 11 Geo. 4 & 1 Will. 4, c. 60, whereby it was ordered that Henley Smith should, in the place of the said F. Kemble, assign the same annuity to the defendants, and after stating that Kemble was a trustee of the said annuity, within the meaning of the act, and that he was out of the jurisdiction of the Court of Chancery, avers, that, by a deed of the 28th of August, 1841, Henley Smith, in obedience to an order of the Court of Chancery, did assign the said annuity to the said defendants; and the defendants then avow the taking, for a distress in respect of a portion of the annuity in arrear. There are five other avowries, for

arrears of five other of the eight annuities; but as the question is the same as to all, it will only be necessary to refer to the first avowry. The plaintiff pleaded five pleas in bar:—First, *non est factum*; second, that Lock did not assign the annuity *modo et formâ*; third, that Kemble was not a trustee of the annuity within the intent and meaning of the act of Parliament; fourth, that Henley Smith did not assign the annuity *modo et formâ*; and last, after craving oyer of the annuity deed, that no memorial was duly inrolled. Issues were joined on the first four pleas, and to the fifth the defendant replied, that the memorial was duly inrolled; setting it out. The plaintiff rejoined, that the memorial contained certain untrue statements as to the parties beneficially interested, and as to the pecuniary consideration for each annuity. The defendants surrejoined, that the memorial did truly state the names of the persons by whom the several annuities were to be received, and the pecuniary considerations for granting the same. Issue was joined on this surrejoinder.

The defendants, at the trial, had a verdict on all the issues: but the plaintiff obtained a rule for setting aside the verdict, and entering a verdict for the plaintiff on the second, third, and fourth issues, and the corresponding issues on the other avowries, or for a new trial. The case was very fully argued last term, before the Chief Baron, my Brother *Platt*, and myself. Three points were made in the argument:—First, that the stamp was not sufficient, being the stamp required for the sum total of all the annuities, viz. £130, whereas it was contended that the stamp ought to have been the aggregate of the stamps required on each, viz. £160. Secondly, that the plaintiff was entitled to the verdict on the second plea, that F. Lock did not assign, and on the fourth plea, that Henley Smith did not assign; the assignments being, in point of law, assignments each of one half only, although in form assignments of the whole, and so stated in the

1845.
HOGARTH
v.
PENNY.

1845.
 HOGARTH
 v.
 PENNY.

avowry. Thirdly, that the memorial was not sufficient, it did not correctly state the particulars required by the statute.

With respect to the question as to the stamp, we are of opinion that the stamp was sufficient. It appears to us that this was in reality a grant of several annuities under one contract between the grantor and the several annuitants, and that it is expressly within the words of the proviso in the Stamp Act, 55 Geo. 3, c. 184, schedule, part 1, tit. "Conveyance:"—"But if separate parts or parcels of such lands or other property shall be conveyed to, or to the use of, or in trust for different persons, in and by one and the same deed or instrument, then such deed or instrument shall be charged with the said ad-valorem duty, in respect of the aggregate amount of the purchase or consideration monies therein mentioned to be paid or agreed to be paid for the lands or property thereby conveyed."

The second objection was presented thus:—In the avowry it was stated that F. Lock had assigned the said annuity to the plaintiff, he being only a joint tenant. One of the pleas to this avowry (the second) was that he had not assigned *modo et formâ*, on which issue was joined. At the trial an assignment was produced, professing to be in terms an assignment of the annuity by F. Lock, but as the assignor was joint tenant only with F. Kemble, the legal effect of that assignment was to dispose of one moiety only; and it was argued, that as in pleading a party is bound to set out an instrument or other matter according to its legal effect, and this deed was not so set out, the plaintiff was entitled to the verdict. A similar objection arose on the third and fourth pleas. At the trial, liberty was given to the defendants (subject to the opinion of this Court) to amend the pleas, if necessary, by stating the assignments to have been assignments of the moieties in each case, according to the legal effect

ch deed, instead of assignments of the entirety, as the are now framed; and, as to the third plea, by stating Kemble was a trustee of a moiety. It was however added, on the part of the defendants, that no amendment was necessary. With respect to any amendment, it objected on the part of the plaintiff, that an amendment, now or at the trial, would deprive the plaintiff of a chance he might have set up by plea that the deed required a memorial to be inrolled, and that there was no memorial; and that, relying upon the objection, the deed was not pleaded according to its legal effect, and failed to resort to any other defence. We think this is not a valid objection to an amendment, and that this is precisely one of the cases which the power to amend was intended to meet. There being but one deed, the plea only (according to the modern rules of pleading)

should be allowed, and the avowants could not, in two pleas, set it out in two different ways. Had they done so, the pleas must have been struck out on motion or demurrers. The plaintiff, therefore, was aware that the deed was liable to be amended, by stating it according to its true legal effect; and if he had any other answer to the avowry, either in substance or in form, it ought to have been pleaded in the first instance. We are therefore of opinion, that these pleas may be and ought to be amended in the mode proposed; and as such an amendment will get rid of the objection, it is unnecessary to discuss the question whether any amendment is necessary, or whether the only mode of taking advantage of such error is not by cravingoyer and demurring.

With respect to the third objection, there is at first no objection, on the ground that the memorial does not correctly state the particulars required by the statute. When the memorial is attentively examined, it turns out that the variance is apparent only, and not real. In

L. XIV.

L L

M. W.

1845.
HOGARTH
v.
PENNY.

1845.
 HOGARTH
 v.
 PENNY.

the deed, the consideration and the mode of payment are stated as they existed between M. Kymer and the grantor. In the memorial, the consideration and mode of payment of each portion of the annuity are stated, as between M. Kymer and the respective grantees, as well as the consideration as between M. Kymer and the grantor; but, in point of fact, all the particulars required by the statute are correctly stated, and something more. It may not have been necessary to state these additional particulars, and we think it was not; but, as all that the statute required to be stated, viz. the date of the instruments, the names of the parties, the sum to be paid, and the other matters, are in fact correctly set forth, though mixed up with other matters, we think also that this objection cannot be sustained; and we are of opinion, therefore, that the rule must be discharged.

Rule discharged.

July 10.

In the Matter of JOHN GRIFFITHS, deceased.

A testator bequeathed to trustees a sum in the £3 per Cent. Consols, in trust, as to £1700, part thereof, to pay and apply

the dividends in establishing and supporting a daily school at N., for the instruction of twenty boys, on the principle of a national school; the dividends to be retained by R. B., sen., and R. B., jun., (two of the trustees) to be so applied: and he directed that R. B., jun., should be the schoolmaster, and that the management of the school should always remain in the family of R. B. And as to £400, other part of the said stock, the testator directed that the dividends should be paid by the trustees to and applied by the schoolmaster for the time being of the said school, in providing the boys with pinafores, caps, and shoes, and also with books and slates; such clothes, books, and slates, to be left behind them on leaving the school:—*Held*, that these bequests were subject to legacy duty.

CROMPTON had obtained a rule, calling upon the executors of John Griffiths, deceased, under the stat. 42 Geo. 3, c. 19, s. 2, to shew cause why they should not deliver to the Commissioners of Stamps and Taxes an account upon oath of all the legacies and of the property of the deceased,

paid or to be paid or administered by them, and why the duties thereon should not be forthwith paid. It appeared from the affidavits, that the said John Griffiths made and executed his will on the 4th of October, 1843, and thereby bequeathed to Richard Benbow, senior, Richard Benbow, junior, and four other persons, their executors and administrators, the sum of £4200, £3 per Cent. Consols, on the trusts therein declared; that is to say, as to £1700, part thereof, upon trust to pay and apply the dividends thereof, when and as the same should accrue due, in establishing and supporting a daily school at Newtown, Montgomeryshire, for the instruction in reading, writing, and ciphering, and in the Church Catechism, of twenty boys, between the ages of six and twelve years inclusive, resident at Newtown or the vicinity, whether parishioners or not; such school to be conducted on the same principle as a national school, and in the same manner as the schools attached or belonging to the Established Church. And the testator declared his will and meaning to be, that the interest, dividends, and annual proceeds arising from the said sum of £1700 Consols, when and as the same should become due, should be paid to and retained by the said Richard Benbow, senior, and Richard Benbow, junior, for the purpose of applying the same, subject to the directions therein contained, in the conduct of the said school; and that, during the life of the said Richard Benbow, senior, the said Richard Benbow, junior, under the direction of his father, should be the schoolmaster of the said school, and from and immediately after the decease of the said Richard Benbow, senior, the said Richard Benbow, junior, should continue schoolmaster of the said school during his life; and it was the testator's will, that the management of the said school should, in all cases and in all events, and for ever thereafter, remain in the management of the family of the said Richard Benbow, senior,

1845.
In re
GRIFFITHS.

1845.
 In re
 GRIFFITHS.

or whom else they might appoint. And, it was the testator's further will, that the appointment and election of boys to be instructed in the said school should, at all times, be in the discretion of the schoolmaster for the time being; and that the schoolmaster for the time being should find and provide a school-room and firing for the use of the said school, the expense thereof to be borne and paid out of the dividends arising out of the said last-mentioned stock. And the testator declared his further will to be, that the dividends arising from the sum of £400, other part of the said sum of £4200 stock, should be paid by his said trustees to, and applied by, the said schoolmaster for the time being of the said school at Newtown aforesaid, in finding and providing the boys attending the said school, and that should mostly stand in need of the same, with pinafores down to the feet, and caps and shoes and also with books and slates, subject to such boys leaving such clothes, books, and slates behind them on their leaving the said school, or their going out to work.—The testator then directed, as to the further sum of £400, other part of the £4200 stock, that the dividends thereof should be paid and applied in and for the purpose of providing lodging-house and bedding, at Newtown or its vicinity, for poor decent Welsh persons passing through the town, who should not have the means of procuring a night's lodging as to the further sum of £700, that the dividends should be received by the said Richard Benbow, senior, for his life; then by his wife for her life; and, after the decease of the survivor of them, should be applied in the endowing and forming a national charity school at Llandinam, in the said county of Montgomery; and the dividends of the remaining £1000 he gave, in two shares of £500 each (subject also to certain life interests therein), to be applied in establishing, endowing, and supporting a national school at Llanidloes, in the same county.

The trustees appointed under the will had applied by petition to the Court of Chancery for a scheme for the regulation and management of the charity-school directed by the will to be established at Newtown, to which petition the Attorney-General appeared, and the Vice-Chancellor of England accordingly settled and approved of a scheme for maintaining and regulating the said school. The executors paid the legacy duty claimed to be due in respect of two sums of £500 Consols each, bequeathed by the will, and offered also to pay legacy duty after the rate of £10 per cent. on the value of the bequest of £700 Consols, calculated as an annuity for the life of the said Richard Benbow and his wife, but the officer refused to receive the same. The executors contended, that they were not liable to pay any legacy duty on the several bequests of £1700, £400, and £400, above mentioned, nor on the bequest of £700 after the decease of the survivor of the said Richard Benbow and his wife; and the present rule was applied for, for the purpose of obtaining the opinion of the Court, whether the said first-mentioned bequests of £1700 and £400 were liable to legacy duty or not.

In Trinity Term (June 10, before *Parke*, B., sitting alone),

Jervis and *Barstow* shewed cause against the rule.—The question in this case is, whether, in that part of this will which relates to the establishment of the school at Newtown, there is a pecuniary bequest to any individual to the amount of £20, within the meaning of the stat. 55 Geo. 3, c. 184, sched., part 3, tit. "Legacy," pl. 2, which is as follows:—"For every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out

1845.
In re
GRIFFITHS.

1845.
In re
GRIFFITHS.

of or charged upon his or her real or heritable estate, &c., and which shall be paid, delivered, retained, satisfied, or discharged after the 31st of August, 1815." Now, looking to the circumstances of these bequests, none of the recipients, it is submitted, takes to the amount of £20. The bequest is of the dividends of two sums of £1700 and £400 £3 per Cent. Consols, amounting, therefore, in the whole to £63 per annum, the benefit of which is to be divided amongst twenty boys, i. e. 3*l*. 8*s*. a year for each. [*Parke, B.*—If they are the legatees, it is not liable to the duty; but, if the Benbows are so to be considered, it is.] That is no doubt the question. The difficulty arises from the supposed conflict between a decision in this Court, *In re Wilkinson* (a), affirmed in *The Attorney-General v. Nash* (b), and a previous decision of the Vice-Chancellor of England in *Ex parte Franklin* (c). In the case *In re Wilkinson*, the testator gave the residue of his property, that his executors might receive the interest thereof, and divide it among poor pious persons, male or female, old or infirm, in £10 or £15 as they should see fit, not omitting sick families, if of good character. This Court, in an elaborate judgment, held that the "poor pious persons" who should be selected by the executors were the parties who took the beneficial interest in the legacy, and were consequently liable to the duty, where the sum received by any of them amounted to £20. In *Ex parte Franklin*, the testator gave and bequeathed to the poor of the parish of Haddenham £50 per annum for ever, to be laid out at Christmas in bread, and distributed by the minister and churchwardens to the most needy objects of the parish. The Vice-Chancellor was of opinion that this was a legacy on which duty ought to be paid; because, although it was not expressed to be given

(a) 1 C. M. & R. 142.

(b) 1 M. & W. 237.

(c) 3 Y. & J. 544; 3 Sim.

147.

to any individual, it was in effect given in such a manner as that the executor held it in trust for certain purposes. The most recent case on this subject, however, is that of the *Attorney-General v. Fitzgerald* (a). There the testator bequeathed the residue of his estate and effects to his executors, to be by them appropriated to the education of the poor in Ireland, principally those in or about the city of Limerick, or as they, his executors, should in their better judgment deem meet to give the bequest the most extensive efficacy. The former cases were all cited, and the Vice-Chancellor of England held that this was a legacy given for the benefit of strangers in blood to the deceased, and that it was substantially the same as if there were already a school existing for the benefit of the Irish poor, and the legacy were given to that school. But the distinction between that case and the present is, that there the executors received the money itself, and divided it at their discretion. [They referred also to *Nash v. Morley* (b) and *Kendall v. Granger* (c).] This is clearly a charitable bequest, under which each donee takes less than £20. It is a case within the 36 Geo. 3, c. 52, s. 11, which enacts, "that if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith, or if the amount or value of any benefit given by any will, &c. cannot, by reason of the form or manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will, &c., as *separate and distinct legacies*

1845.
In re
GRIFFITHS.

(a) 13 Sim. 83.

(b) 5 Beav. 177.

(c) Id. 300.

1845.
 In re
 GRIFFITHS.

or *bequests*, and shall be paid out of the fund applicable for such purposes, or charged with answering the same. It is not by reason of its being a *charity* that this bequest is exempt from duty, but by reason of the objects of the bounty (it being impossible to ascertain the amount, except by its application from time to time among them) each taking less than £20. It is a case in which the parties entrusted with the superintendence of the school would be compelled by a court of equity to carry out the objects of the trust: it is in no sense a legacy to themselves.

Crompton, contra.—The present case is distinguishable from that of *In re Wilkinson*; but it is directly within the decision in *The Attorney-General v. Fitzgerald*. It is in truth the *excepted case* carefully pointed out in the judgment in *In re Wilkinson*, where the Court say that by their decision “they do not mean to question the legality of the practice of imposing the highest rate of duty on bequests to corporations or societies established for charitable purposes, or to individuals in trust for such societies.” There is, therefore, in reality, no clashing of the authorities on this subject. If the argument on the other side be correct there can be no bequest for the benefit of a charity which will be liable to duty. It is not meant to be contended that this is not a charity; but the question is, whether it is not still liable to the duty. It is so, because it is a gift to the charity, not to the individuals who may partake of it. Many of the statutes relating to legacy duty contain special exemptions in favour of particular charities, and in particular districts. For instance, by the 39 Geo. 3, c. 73 all legacies of books, prints, &c., or other specific articles given or bequeathed to or in trust for any body corporate or the society of Serjeant’s Inn, or any of the Inns of Court or Chancery, or any endowed school, to be kept and reserved by them, are exempted from legacy duty. So, the

1845.
In re
GRIFFITHS.

42 Geo. 3, c. 99, s. 4, exempts from duty a legacy bequeathed in trust for the purpose of erecting and endowing a public hospital and infirmary at Bedford, for the reception and relief of sick and lame objects within that county. That is in effect this very case. It cannot be supposed that the *patients* in the hospital were to be the legatees, or that inquiry was to be made whether the medicine supplied amounted to £20 a year for each. Again, in the 56 Geo. 3, c. 56, (Irish), there is an express exemption from duty of legacies given for the education and maintenance of poor children in Ireland, or for any purpose merely charitable, which is repeated in the 5 & 6 Vict. c. 82. In none of these cases could the benefit amount to £20 each. In *Nash v. Morley*, an apprehension was intimated that the decision in *In re Wilkinson* might interfere with the equitable jurisdiction of the Court of Chancery. That is, at all events, good ground for not carrying that decision any further. There can be no doubt that, if the case of *Ex parte Franklin* was well decided, this bequest is liable to duty; and that case has never been determined to have been wrongly decided. [Parke, B.—Is there any difference, whether you leave a man £20, or leave so much to be laid out in a suit of clothes for him? Is it not equally a legacy?] That principle could hardly be applied to *education*. There is no difference whether the testator leaves £20 to A. B., or leaves it to a person whom his executor shall select; it is merely putting the executor in the place of the testator for that purpose; and that is, in substance, the case of *In re Wilkinson*. But *learning*, or medical attendance, is a thing one cannot well call a legacy. This is in effect the same as a bequest to a hospital. It is impossible to distinguish between a bequest to endow a new school, and a bequest for the benefit of an existing one. If this be, as it clearly is, a charity which would require a scheme, then it is as clearly within the de-

1845.
 In re
 GRIFFITHS.

cision in *The Attorney-General v. Fitzgerald*. It can never be said that the first donor's gift to the school is to be exempt from duty, but that every future donor's is not. With respect to the argument drawn from the 11th section of the 36 Geo. 3, c. 52, the answer is, that here the trustees take the whole fund at once, and therefore the aid of that section is not required to ascertain the amount.

Cur. adv. vult.

The judgment was now delivered by

PARKE, B.—This case was argued before me on the last day but one of the last term; and, by consent, I was to deliver my judgment in vacation.

The question is as to the liability to legacy duty of two sums of £1700 and £400, bequeathed by the testator John Griffiths to Richard Benbow and others, upon trust to pay and apply the dividends in establishing a school at Newtown for the instruction of twenty boys, with directions to pay such dividends to Richard Benbow, junior, who is appointed the schoolmaster; and £400 is left to the trustees, the dividends to be paid to the schoolmaster for the purpose of supplying the scholars with pinafores, shoes, and books.

The doubt as to the liability of these legacies to duty has arisen from the decision in this Court, in *In re Wilkinson* (a), which is supposed to be at variance with a previous decision of the Vice-Chancellor of England, in *Ex parte Franklin* (b); but which was confirmed by the Court of Exchequer Chamber in *The Attorney-General v. Nash* (c). Since then, the subject has undergone further considera-

(a) 1 C. M. & R. 142.

(b) 3 Y. & J. 544; 3 Sim. 147.

(c) 1 M. & W. 237.

tion by the Vice-Chancellor, in the case of *The Attorney-General v. Fitzgerald* (a), and he held that monies left to trustees for the purpose of founding a school was a legacy to the trustees, for the benefit of strangers in blood, not to the individuals partaking of the benefit of the charity, and was liable to legacy duty.

1845.
In re
GRIFFITHS.

The case before me was fully argued by Mr. *Jervis* and Mr. *Barstow* for the legatee, and by Mr. *Crompton* for the Crown. By the former, it was likened to the case of *In re Wilkinson*; by the latter, it was said closely to resemble that of *The Attorney-General v. Fitzgerald*, both as to the £1700 and the £400, which last sum is given for the benefit of the school, though applicable in a particular manner, and confined to one branch of its expenses. I am satisfied that the argument for the Crown is right, and concur in the opinion of the Vice-Chancellor, that the legacies are liable to duty, in the same manner as if they had been bequeathed to the trustees of an existing school for the purposes therein contained. The duties must, therefore, be paid on these and the other similar legacies, and the rule must be absolute.

Rule absolute.

(a) 13 Sim. 83.

1845.

July 2.

THORPE v. PLOWDEN.

In 1711, W. P., lord of the manor and patron of the church of Aston-le-Walls,

THIS was a feigned issue, brought under the 46th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, to try the validity of the decision of the Assistant Tithe Com-

being seised in fee of certain lands lying dispersed in the common fields of Aston, and J. W. being rector of the said church, and in right thereof seised of other parcels of lands, also lying dispersed in the said common fields, (being the glebe lands belonging to the rectory), and also of the tithes as well of the said common fields as of the demesne lands of the said W. P., an agreement was made, on the 1st of March, 1711, under the hands and seals of the said W. P. and the said J. W., by which it was agreed that the said W. P. should convey to the said J. W., and his successors, for ever, certain lands therein specified, to be enjoyed as the glebe lands held by the church, and the rectors thereof, for ever; and also that the said W. P. should grant to the said J. W. and his successors, for ever, an annuity of £40, to be charged on his manors and lands. And the said J. W. did thereby for himself, and, as far as in him lay, for his successors, covenant and agree with W. P., and his heirs and assigns, that all those pieces of land reputed as the glebe lands should thenceforth be possessed and enjoyed by W. P., and his heirs, for ever; and also that all the lands of which the said W. P. was the owner in Aston (including the lands the tithes of which were in question) should be freed and charged from the payment of all manner of tithes, &c. Afterwards, on a petition to the ordinary, a commission was issued under which it was certified to the ordinary that the exchange would not be prejudicial to the rector, and he granted his license for carrying it into effect. A bill in Chancery was afterwards filed by W. P. against J. W., the rector, and the bishop, the ordinary, in which suit a decree was made, in Trinity Term, 1715, that the agreement should be performed and the exchange confirmed. In pursuance of this agreement, J. W. took possession of the lands and enjoyed the same, and he and his successors received, as it became due, the annuity of £40 so given in exchange for the glebe lands and as a composition for the said tithes, until June, 1831, when the plaintiff became rector, and the plaintiff himself received it until Michaelmas, 1832, but not since. No tithes had been taken from the lands of the said W. P. so exempted from tithes by the agreement from the making thereof, and that agreement, at the time of the passing of the 2 & 3 Will. 4, c. 100, had not from the making thereof been set aside, abandoned, or departed from. The manor and all the lands of the said W. P. descended to one E. P. before and on the 10th of July, 1833, and so continued till his death in 1838, when they descended to one W. H. F. P., the defendant. On the 7th June, 1833, a notice was served on certain occupiers, as well as E. P., the owner, of the lands in question, requiring the tithes to be set out and paid in kind to the plaintiff, and on the 10th of July, 1833, a bill was filed in the Exchequer in equity against the occupiers, praying for an account of the single value of the tithes, but no bill was then filed against E. P., the owner of the lands; but by an order of the 15th of January, 1835, the bill was amended, and E. P. was made a party defendant thereto. The cause having been heard, the bill was dismissed against E. P., but the Court directed that the occupiers should account for the tithes. Against that decree, the defendants, including E. P., appealed to the House of Lords, and on the 6th February, 1840, the decree was reversed. Pending the appeal to the House of Lords, actions of debt were brought by the plaintiff against the same occupiers, under 2 & 3 Edw. 6, to recover the treble value of the tithes of the same lands which accrued subsequently to those sought to be recovered by the bill in equity, and in such action the plaintiff was held entitled to recover, and the treble value of the tithes was paid pursuant thereto.

A feigned issue having been brought under the 46th sect. of 6 & 7 Will. 4, c. 71, to try the validity of the decision of the Assistant Tithe Commissioner as to whether the above lands were free from tithes, and a special case having been brought for the opinion of this Court, stating the above facts—*Held*, first, that the above agreement of 1711 was a valid composition for tithes, within the meaning of the 2nd section of 2 & 3 Will. 4, c. 100.

Secondly, that the proceedings and suits which took place in 1833 and subsequently were not sufficient to take the case out of the statute, the plaintiff not having commenced any suit or action against E. P. within one year from the passing of the act, within the meaning of the 3rd section.

missioner, as to whether certain lands in the parish of Aston-le-Walls, in the county of Northampton, were free from the payment of tithes. At the trial, before *Coltman, J.*, at the Northampton Summer Assizes, 1844, a verdict was taken for the plaintiff, subject to the opinion of this Court upon the following case.

1845.
THORPE
v.
FLOWDEN.

It was proved at the trial, and was admitted, that the plaintiff was, on the 31st December, 1831, duly instituted and inducted into the rectory of the parish church of Aston-le-Walls, and had since been and still remained rector of the said parish, and that all the requisites necessary to support the action had been complied with, provided the circumstances stated were not sufficient to defeat the claim. It was proved on the part of the defendant, who was the owner of the lands in question, that the said lands, in the year 1711, except the glebe lands given up to William Plowden under the agreement of the 1st March, 1711, thereafter mentioned, were the property of William Plowden, and afterwards descended to, and in the year 1833, continued to be the property of, one Edmund Plowden; and that, in the year 1711, the said William Plowden, who was also lord of the manor and patron of the church of Aston-le-Walls, being seised in fee and absolute owner of divers parcels of land lying dispersed in the late common fields of Aston-le-Walls aforesaid, and John Wilson being rector of the said church, and in right thereof seised (among other things) of several other parcels of land, lying also dispersed in the said late common fields, and also of a parcel of ground lying and being in a close (called by the name of Aston Close), in Appletree, in the parish of Aston aforesaid, being the glebe lands belonging to the said rectory, and also of the tithes of all sorts arising as well out of the said common fields as out of the demesne lands of the said William Plowden, and, the said William Plowden having then lately inclosed the said common fields, an agreement in writing,

1845.
 THORPE
 v.
 PLOWDEN.

bearing date the 1st day of March in that year, was made by and between and under the hands and seals of the said William Plowden and the said John Wilson, by which it was agreed, that the said William Plowden should convey and assure unto the said John Wilson and his successors, rectors of the said church, for ever, certain lands in the said agreement specified, which he agreed should be enjoyed as the glebe of and belonging to the church of Aston aforesaid, and the rector thereof, and his successors, for ever; and also that the said William Plowden, his heirs and assigns, should, on or before the 20th day of February next ensuing the date thereof, grant unto the said John Wilson and his successors, rectors of the said church, for ever, an annuity of £40, to be charged upon the said manor, lands, and hereditaments, the same being of sufficient value; and the said J. Wilson did thereby, for himself, and, as much as in him lay, for his successors, rectors of Aston aforesaid, covenant and agree to and with the said William Plowden, his heirs and assigns, that all those parcels and pieces of land theretofore reputed and taken as or for the glebe land of or belonging to the church of Aston-in-the-Walls aforesaid, and which lay in the late common fields of Aston aforesaid, and theretofore in the possession of the said John Wilson, his tenant or tenants, and the said parcel of ground thereinbefore mentioned to be in the said close called Aston Close, in Appletree aforesaid, (except such parts thereof as lay in the said parcels of ground and meadow thereby agreed and appointed for glebes), should from thenceforth be possessed and enjoyed by the said William Plowden and his heirs, as his and their own proper estate for ever; and also that all and singular the lands, tenements, and hereditaments whereof the said William Plowden was then possessed or owner in Aston aforesaid, and every of them, (including the lands, the tithes of which are in question in this issue), were and should be freed and discharged for ever of and from the

payment of all and all manner of tenths, tithes, and oblations, obventions, moduses, compositions, and all other dues theretofore due and payable out of the estate of him the said William Plowden, in Aston aforesaid, (except such tithes and dues as were purely personal). Afterwards, in the year 1714, in consequence of a petition of the said William Plowden and the said John Wilson to the ordinary, (that is to say), to the Lord Bishop of Peterborough, within whose diocese and jurisdiction the said church and rectory was situated, a commission was duly issued by the said bishop to inquire into the expediency of the said exchange, and the commissioners named in the said commission having met and examined witnesses, and duly inquired into the circumstances, returned the said commission, and certified to the said bishop by their said certificate, that the said exchange would be no ways prejudicial or detrimental to the said John Wilson, or his successors, rectors of Aston aforesaid, but would be an improvement of and augmentation to the said church and rectory of above £60 per annum, and thereupon the said bishop, by an instrument under his hand and episcopal seal, did duly consent, give, and grant his leave and license to and for carrying into effect the said exchange. Afterwards, the said William Plowden, being the patron of the living as hereinbefore mentioned, filed a bill in the high Court of Chancery against the said J. Wilson and the said bishop, who put in their answers respectively, and, the cause having been heard, a decree in and of Trinity Term, 1715, was made therein by the said court, by which it was declared, that the said articles of agreement entered into between the plaintiff, William Plowden, and the said defendant, J. Wilson, should be performed; and that the said exchange of the said lands be confirmed and made perpetual; and that the said parties should hold and enjoy the said premises according to the said exchange; and that conveyances should be made

1845.
THORPE
v.
FLOWDEN.

1845.
 THORPE
 v.
 FLOWDEN.

pursuant thereto; and such decree now stands as of record in the said Court of Chancery, and in nowise reversed or altered. In pursuance of the said agreement, the said John Wilson forthwith took possession of the lands, and received, when and as it became due, the said annuity of £40 so given in exchange for the said glebe lands, and as a composition for the said tithes and lands, and the said lands have from that time to the present been held and enjoyed by the said John Wilson and his successors, rectors of the said church, and are still held and enjoyed by the said plaintiff as such rector as aforesaid, and the said annuity of £40 was received by the said John Wilson and by his successors, from that time up to the 24th of June, 1831, the said plaintiff having himself received it from the period when he became rector of the said church up to and until Michaelmas, 1832, and not since. No tithes or tenths, or any payment in lieu thereof, except as aforesaid, have been received or taken from the said lands so exempted therefrom by the said agreement, including the said lands of the said defendant, from the time of making the said agreement hitherto: and the said agreement, at the time of the passing the statute of the 2 & 3 Will. 4, c. 100, intituled, "An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from Tithes," had not, from the time of the making thereof, been set aside, abandoned, or departed from.

The said manor, and all the said lands of the said William Plowden in the parish of Aston-le-Walls, descended to, and became and were the estate in possession of, one Edmund Plowden hereinafter mentioned, before and on the 10th day of July in the year 1833, and so continued till his death on the 4th day of April in the year 1838, when they descended to and became, and still continue to be, the estate in possession of the defendant, William Henry Francis Plowden. A notice, on the 7th day of June, 1833, having been served by the said plaintiff on Thomas Mattingley, William Budd,

George Bliss, and Charles Cowper, who were then the occupiers, as well as Edmund Plowden, the owner of the lands in question, that he did, from that time, require all the tithes, both great and small, to be set out and paid to him in kind, the said plaintiff did, on the 10th day of July, 1833, file his bill in his Majesty's Court of Exchequer against the said Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, who were then the occupiers, as well as the said Edmund Plowden, the owner of the said lands so exempted from the tithes by the said agreement, praying that the defendants in that suit might be decreed to account for the single value of all the tithes of the said lands, but no bill was then filed against the said Edmund Plowden, the owner of the said lands. Afterwards, on the 12th day of December, 1833, the said defendants filed their answer, and, amongst other things, submitted that the said Edmund Plowden ought to be made a party to that suit; and afterwards, pursuant to an order of the said Court, dated on the 15th of January, 1835, the said bill was amended, and the said Edmund Plowden, by the said amendment, was made party defendant thereto, and the cause having been duly heard, on the 15th day of February, 1837, by a decree of that date, the said bill was dismissed against the said Edmund Plowden, and the Court decreed, that the said Thomas Mattingley, William Budd, George Bliss, and Charles Cowper should account for such tithes according to the prayer of the said bill. Against this decree the said several defendants, including the said E. Plowden, on the 23rd day of November, 1837, appealed to the House of Lords. On the 6th day of February, 1840, judgment on the said appeal was pronounced by the House of Lords, whereby the decree was reversed, and the plaintiff's bill in that suit was dismissed with costs against the said Edmund Plowden, and also against the said Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, and the said order and judgment of the

1845.
 THORPE
 v.
 PLOWDEN.

1845.
THORPE
v.
FLOWDEN.

House of Lords was made an order of the said Court of Exchequer on the 10th day of July, 1841, and the said bill of the said Henry Thorpe dismissed with costs as against the said Edmund Plowden, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, which order was affirmed by the Lord Chancellor, on an appeal presented against the same by the said Henry Thorpe, on the 21st day of December, 1842. Pending the said appeal to the House of Lords, and on the 16th day of October, 1838, actions of debt were brought in this Court by the plaintiff against the said Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, under the act of Parliament passed in the reign of Edward the 6th, intituled "An Act for the payment of Tithes," to recover the treble value of tithes of the same lands not set out, and which accrued subsequently to those sought to be recovered by the bill in equity, in which actions a verdict was found for the plaintiff, subject to the opinion of this Court upon a special case, which said case set forth the statements hereinbefore contained, (except the order on the said appeal to the House of Lords in the equity suit, which order had not then been pronounced), and in which the question for the opinion of this Court was, whether the plaintiff was, under the circumstances detailed, entitled to retain the same verdict. The case was argued on the 29th of May, 1839, when this Court was of opinion that the plaintiff was entitled to retain his verdict, and the judgment was entered up accordingly, and the treble value of the said tithes was paid to the plaintiff pursuant thereto. The tithes of the lands in question, recovered in the last-mentioned actions, were for the year from Michaelmas, 1837, to Michaelmas, 1838. The occupiers, the defendants in that action, commuted, by agreement with the plaintiff, the tithes accruing for the said lands from Michaelmas, 1838, to Michaelmas, 1839, in order to prevent the necessity of bringing and trying other actions whilst the appeal to the House of Lords was

pending, the said defendants at the same time stating that they did so without prejudice to the right of the parties as to the question then pending in the said appeal. On the 19th day of August, 1842, pursuant to a notice to that effect, the commissioners for commuting the tithes for England and Wales proceeded by their assistant commissioner to hold an award meeting for commuting the tithes of the parish of Aston-le-Walls aforesaid, when the plaintiff, as rector, claimed tithes of the land in question, whilst it was contended by the defendant that, under the said decree of the Court of Chancery of Trinity Term, 1715, and the matters hereinbefore mentioned, such lands were discharged from payment of all manner of tithes. The finding or decision of the assistant commissioner is set forth in the declaration. The present action was commenced on the 17th day of May, 1843. It was agreed at the trial of this action, that the said agreement, the said proceedings before the Lord Bishop of Peterborough, and the whole of the proceedings in the Court of Chancery, and in this Court, should form part of the present case, and should be referred to by either party as if the same had been set out at length therein. The question for the opinion of the Court is, whether the plaintiff is entitled to a verdict. If the Court should be of opinion that he is, then the verdict entered up in his favour shall be retained, otherwise the said verdict is to be set aside, and to be entered up in favour of the said defendant.

1845.
 THORPE
 v.
 FLOWDEN.

Crompton, for the plaintiff.—First, this is not a composition for tithes within the meaning of the stat. 2 & 3 Will. 4, c. 100, s. 2. But secondly, supposing it to be so, the proceedings and suits which have taken place have taken the case out of the operation of the act.

First, this is not at all in the nature of a composition for tithes. It is an exchange of certain lands, and the tithes form a very small part of the subject-matter of it,

1845.
 THORPE
 v.
 FLOWDEN.

the primary object of the agreement being the exchange of the lands. The agreement recites the object to be "for the better improvement of the said common fields." It is not a mere composition, in the sense used by the statute. The agreement is upon condition of giving up the glebe land, which was invalid and inoperative, and the tithe; it is therefore illegal altogether; for you cannot divide the part which is legal from the other which is not. It can only be supported where on one side they can have all that is given in lieu of what is given on the other. The glebe lands could not be acquired by this agreement. Such an agreement could never derogate from the right of the church. That has been so often decided that it is unnecessary to argue it. Therefore, when this act of Parliament came into operation, Mr. Thorpe, the rector, had a perfect right to take the glebe land, which notwithstanding this agreement belonged legally to him. This is not therefore a composition within the second section of the 2 & 3 Will. 4, c. 100, which enacts, "that every composition for tithes which hath been made or confirmed by the decree of any Court of Equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act." [*Parke, B.*—Your argument is, that a composition for tithes means only where something is given on one side exclusively for tithe?] Yes, and that where there is something given which is illegal in itself, and which must invalidate the whole agreement, the act cannot apply. The primary object of this agreement is not the tithe but the inclosure, and in the half-yearly receipts for the £40

they treat it as for the inclosure. The agreement is not that the money or the lands are to be given for the tithe, but that the tithe and the glebe are to be given for the rent-charge and the other lands. [*Parke, B.*—You cannot tell exactly what is given for the composition of tithe—whether the surplus quantity of lands or the money]. If this is to be construed as a composition for tithe, the exchange of the lands must be good also. But the agreement as to the glebe is illegal and invalid, and the contract cannot be binding at all, unless each party had what he bargained for. The moment the act passed, there was nothing to prevent the plaintiff from bringing an ejectment to recover the glebe lands, as no time runs against the church; and there may be some mode, either in equity or otherwise, in which the other party could get back his lands. Therefore you cannot say that the party has the consideration for which the tithes were given up. The failure of the consideration destroys the whole contract. The statute cannot apply to the transaction, unless it can apply to the whole bargain; you cannot say it shall make it good as to a part only. Where part must remain as an illegal transaction, the act cannot be taken to make any part valid. The title of the act is, “An act for shortening the time required in claims of *modus decimandi*,” and as it is not to give any new composition, it can only apply to compositions which were before good in point of law; but this, not being so, is therefore not a composition within the meaning of the act.

But, secondly, supposing it is a composition within the meaning of the act, the proceedings and suits which have taken place have taken the case out of the provisions of the act. The second section says, that every composition which has been made or confirmed by the decree of any court of equity, “in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall

1845.
THORPE
v.
FLOWDEN.

1845.
 THORPE
 v.
 PLOWDEN.

be and the same is hereby confirmed and made valid in law." If it stood on that, without reference to the third section, there would be some difficulty, for that would prevent the rector from recovering his tithes in kind. Suppose that up to the passing of this act the usage had prevailed and not been departed from, to pay tithes in kind, and then an action is brought, would you not say that the word "since" had reference to the time of bringing the new action? It could hardly mean that you are to look back to 1838, to see whether at that time it was departed from or not. The legislature could hardly intend, that if it was in part set aside or abandoned after that time, that would not give the rector a right to sue. If in all after-ages you are to look back to the year 1838, in a little time you would have all the inconvenience which has been suffered, of going back to the time of Richard I, which the statute was intended to remedy. But the third section, at all events, coupled with the second, will, as far as the present case goes, put an end to any difficulty in that respect. It enacts, that that act "shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced during the present session of Parliament, or within one year from the end thereof." The object of that section was, that if parties were contesting the right at the time, then they should stand upon their rights if they could make them out, but the statute should be no hurt to them. That is the construction which this Court put upon it in *Thorpe v. Mattingley* (a). The facts were these:— There was within the year an equity suit against the occupiers of land, in which, by mistake, the owner of the land was not made a party originally, but was added afterwards. There was a decision by the Court

(a) 5 M. & W. 302.

of Exchequer in equity decreeing an account. There was then an appeal to the House of Lords, and during the pendency of that appeal an action was brought at common law in this court, and the present plaintiff recovered his treble value of the tithes, under the statute 2 & 3 Edward VI. The Court held, that the suit going on on the equity side of this Court was sufficient to satisfy the third section, and that the rector had a right to his tithes, though the action for not setting out tithes had not been brought within the year. It may be said that that decree was reversed, and so it was, but upon a mere technical point only. The meaning of the act is this;—if you have no defence, the statute shall be none for you, and if you have a good defence, still it shall be no defence for you; for if you are asserting your rights within the year, you do not want the statute. This is a case within the very words of the third section. It says, that the act shall not be prejudicial or available to the plaintiff or defendant, in any suit now commenced, or which may be hereafter commenced during the present session, or within one year from the end of it. Now there can be no doubt that this act is here sought to be used to the prejudice of the plaintiff, who was the plaintiff in the equity suit which was commenced within the year. There is nothing to confine the clause to the particular suit. [*Alderson*, B.—According to the defendant's construction of the word "since," it is to terminate from the time of the passing of the act: then, if a person has abandoned or departed in any way from the composition, but within the twelve months brings an action for not setting out the tithes, and recovers, and brings another action the following year, he would fail, though he had commenced his action within the time limited by the act.] That must be the result, unless the plaintiff's construction be adopted. [*Alderson*, B.—That, however, does not apply here, for the suit was not successful.] Yes, the plaintiff's suit was successful. The tithes were recovered,

1845.
 THORPE
 v.
 FLOWDEN.

1845.
 THORPE
 v.
 FLOWDEN.

and have been since paid. But the word "successful" cannot be imported into the act. There is no reason for so doing. On the contrary, it would lead to the greatest absurdity. The bringing the action against the party will keep alive the right, as was decided in this Court in *Thorpe v. Mattingley*. Here, however, in the former suit in equity, the plaintiff did obtain a decree in his favour. A bill was filed within the year, and there was a decision upon it in favour of the plaintiff. It may be said, however, that the suit must be successful in the *result*; but there is no ground for introducing those words. It is admitted that Lord *Cottenham* did, in the case in the Lords, express a doubt as to the correctness of the decision of the Court below: *Plowden v. Thorpe (a)*. In the course of the argument in that case, a question was raised whether the suit in equity was well commenced, as Plowden, the then owner of the property, was made a defendant (by amending the bill) after the year expired. And Lord *Cottenham* said, "The view I have taken upon this part of the case makes it unnecessary to observe on the construction of the 2nd & 3rd Will. 4, c. 100. Had it been necessary to decide that question, I should have found much difficulty in concurring in an opinion, that a defendant against whom no proceedings were instituted until January, 1835, could not claim the benefit of the third section, because the suit to which he was made a defendant by amendment had been commenced against others within the prescribed time." But he gave no decision upon the point, and the question was not really before him. The case did not depend upon whether the owner was a party to the record at all; it was a suit against the occupiers. That case does not overrule the decision in *Thorpe v. Mattingley*, which is expressly in point. Lord *Abinger*, C. B., in that case, says (*b*), "I think the reasonable construction of the statute is, that

(a) 7 Cl. & Fin. 161.

(b) 5 M. & W. 305.

the parties shall not be entitled to raise the question of the validity of a tithe composition, confirmed in the manner mentioned in s. 2, unless they commence their action or suit within the time limited by the 8rd section. The plaintiff has done this by his suit in the Exchequer, by the decree in which the composition has been set aside, and he is therefore entitled to our judgment." The plaintiff has therefore brought his case within the words of the 2nd section. The Court must hold that the statute meant to apply to the time when the question came into controversy in the former action. [*Alderson*, B.—If you construe the word "since" to mean "up to the time of action brought," you give it a reasonable construction.] That is the construction to be put upon it.

1845.
 THORPE
 v.
 PLOWDEN.

Bethell, for the defendant.—First, as to whether this is a composition within the act. In an early stage of this case, when it was before *Alderson*, B., on the equity side of this Court, his Lordship gave a clear expression of opinion that this was a composition of the nature contemplated by the 2nd section of the act. In giving judgment in that case, he says (a), "There is no question that such an agreement would now be valid under Lord Tenterden's Act, the provisions of which clearly apply to the present case." It will be necessary to explain how, consistently with that opinion, Mr. Baron *Alderson* made the decree he did. In an early stage of the cause, before Lord *Abinger*, C. B., a question arose, whether Mr. Plowden was duly made a party to the cause; and Lord *Abinger* was of opinion, that if the rector had instituted his suit within the twelve months, it was competent to him to add any number of parties to the suit at any subsequent time, though the parties were added after the expiration of the twelve months. It was not competent to Mr. Baron

(a) 2 Y. & C. 441.

1845.
 THORPE
 v.
 FLOWDEN.

Alderson, sitting in equity, to overrule or alter what was done by the Chief Baron; and, although he held that the agreement was that species of composition contemplated by the act, yet, not being at liberty to hold that the suit had not been instituted against Mr. Plowden, he was obliged to decree as he did. That was one of the grounds for the defendant's going to the House of Lords with an appeal; but their Lordships found grounds for reversing the decree independently of that point, and it is agreed, that although Lord *Cottenham* intimated an opinion on that ground in favour of the defendant, yet the point was not there decided. In the case of *Cooper v. Byron*, the Chief Baron followed his former decision. That case was carried to the House of Lords, and was argued at the bar of the House, and the unanimous opinion of the House was delivered by Lord *Brougham* (a). In that case, a bill, brought by the rector of a parish against certain occupiers, was filed on the 5th of August, 1833, within the twelve months allowed by the act. That bill was amended on the 3rd of November, 1834, and four other defendants were added. The new defendants insisted that the suit had not been instituted within the time allowed by the act, and that they were entitled to the benefit of its provisions; and the House of Lords so decided, and dismissed the bill against the four new defendants. The 3rd section of the act provides, that it shall only apply to suits commenced after the expiration of one year from the end of the then session of Parliament. Now that session ended on the 16th of August, 1832; consequently the amended bill was filed fifteen months after the act passed. Lord *Brougham*, in delivering the judgment, after stating the above facts, says (b), "The first miscarriage in the court below, however, was to consider the whole defendants to the suit, the whole nine appellants, as excluded from the operation of the act

(a) 11 Cl. & Fin. 556.

(b) *Id.* 579.

The ground of this opinion was, that the bill, being originally filed before the 16th of August, 1833, and the four last-named appellants being, under an order of the Court of Exchequer, made defendants to the same bill, were as much excluded by the 3rd section of the act, as if they had been made originally defendants to the bill filed on the 5th of August, 1833. This is as great and as manifest an error as could well be committed." And, after stating that there was no privity whatever between the different defendants, and that one defendant might set up a defence of a totally different kind from the others, his Lordship proceeds:—"The parson is permitted to add new defendants to his amended bill, in order to save delay and expense; but each defendant so added is to be considered as sued by the proceeding which makes him a defendant, and the date of his being added is the date of the suits commencement quoad him." In that opinion Lord *Cottenham* and Lord *Campbell* concurred, and the House was unanimous upon the point; and the decree was reversed. The House of Lords was unanimous in thinking that the true construction of the act was, that its operation was suspended for twelve months, in order to allow the rector to institute a proper suit for tithes: but if he failed within that time to institute the *proper* suit, then the statute was available to every individual not made a defendant within the period of time allowed. [*Parke*, B.—In order to invalidate the decree under the second clause, there must have been a departing from it before the act passed—a subsequent departing from it would not do.] No otherwise than this, that, whatever individuals are parties to a decree, they may afterwards release the benefit of it. [*Parke*, B.—The decree which my Brother *Alderson* made was a decree for the tithes.] Yes, for the single value of the tithes. That was the original error, which has never been avoided. In that case the counsel began by ad-

1845.
 THORPE
 v.
 FLOWDEN.

1845.
THORPE
v.
FLOWDEN.

mitting that the bill must be dismissed as against Mr. Plowden.

The words of the 2nd section of the act clearly point to a composition of this kind, and not merely to compositions real, which were good before the restraining stat. of the 18th Eliz.; and the legislature, in the clearest language, has pointed out to rectors or vicars, that, if there exist a composition real in their parish, originating in such a way that they may, if they choose, avoid it, they must do so within a limited time. That being so, it follows as a necessary consequence, that the moment it was decided by the House of Lords that Mr. Plowden was not properly made a party within the statute, he became entitled to the benefit of the act, and was entitled to say, the agreement is valid, and I may avail myself of the statute in any proceedings that may be taken to set it aside. Now, if that be the true construction, the Court will be of opinion that the decree made in 1715 was a decree within the meaning of the 44th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, which provides, "that if it shall appear to the said commissioners or assistant commissioner, that any question concerning any modus or composition real, prescriptive or customary payment, or claim of exemption from or non-liability to the payment of tithes relating to the land in question, shall have been decided by competent authority before the making of the said award, the commissioners or assistant commissioner shall act on the principle established by such decision." Now, take the decree of the court of equity in 1715, and the second section, which says, "that every composition for tithes, which hath been confirmed by the decree of any court of equity, shall be confirmed and made valid in law;" and we have a final decree, establishing the agreement and deciding that the composition is good. There has been every requisite and character of a decree within the meaning of the 44th section of the Tithe Com-

mutation Act, and which was binding upon the commissioner. The object of the agreement was to put an end to a claim for tithes over Mr. Plowden's land, and also to benefit the church by an exchange of the uninclosed land then within the parish, the glebe land lying, as stated, dispersedly amongst the uninclosed lands; and certain particular allotments are thereby given to the rector, together with an annuity of £40, and the glebe is given to Mr. Plowden; and all his lands are to be tithe free. Upon the construction of this agreement, Lord *Cottenham*, in *Plowden v. Thorpe* (a), after stating the agreement, and that it had been sanctioned by the bishop, and become the subject of a suit in Chancery, in which a decree was made establishing the arrangement, says, "It appears to me that, inasmuch as the value of the tithes released exceeded the £40 per annum rent-charge, and the value of the lands given by Mr. Plowden exceeded the value of the glebe lands taken, by a sum equal, or very nearly equal to £90 a year, if the £40 a year had been in lieu of the tithes, it would have been an inadequate compensation for them, even according to their then existing value, the tithes being nearly £60 a year, and the rent-charge only £40. If the lands were to be exchanged for the glebe lands, it would appear that that would not be the contract, inasmuch as the glebe lands were of the value of £76 a year, and the lands granted to the rector by Mr. Plowden were of the value of £130 a year. It is quite clear, therefore, that some part of the lands granted by Mr. Plowden to the rector were in consideration of the discharge of his other lands from tithe. It is most important to keep that fact in view when your Lordships come to consider how far the authority, which has been the guide of the Court below upon this subject, can be considered as applicable to this case." Lord *Cottenham* there shews,

1845.
 THORPE
 v.
 PLOWDEN.

(a) 7 Cl. & Fin. 158, 159.

1845.
 THORPE
 v.
 FLOWDEN.

that by this agreement the land is given in lieu of tithes, and therefore it was a composition real. He then goes on to discriminate between that case and the *Attorney-General v. Cholmley* (a); that there money was given for the tithes, and land was given for the land. That is an answer to the argument that this is not a composition for tithes. It is not only a composition for tithes in the sense of a money payment, but in that of giving a portion of the lands to the rector for ever. [Parke, B.—Mr. Crompton's argument is, that a composition for tithes must be land or money given solely for tithes; but that this is a composition of tithes and land all mixed together.] There is no authority for saying that such a composition may not be made. It is not invalid, because it has involved in it certain other things which are parts of the agreement. [Alderson, B.—It cannot be material whether the exchange of glebe be or be not valid: the question is, whether this is not, inter alia, a composition for tithes; and if it be valid as such, that is all you want.] So far as it is a composition for tithes, so far the Court would regard it; they are not called upon to say what effect it would have on the glebe: they are only called upon to say whether it be or be not a composition for tithes. One of the grounds upon which the House of Lords proceeded in this case was, that the rector, at the time of claiming the tithes, was in possession of the very land, part of which was clearly given in lieu of the tithes, and was actually in the enjoyment of that very composition. Is it possible for the rector, who is now in the enjoyment of these lands, to say that this is not a composition for tithes, it being apparent that those lands were, as to part, (which part not being ascertainable), actually taken in lieu of tithes? The Court have nothing to do with the question as to the glebe lands; but if it were necessary to determine it, it is quite clear that, since the new Statute of Limitations, 3 & 4 Will. 4, c. 27,

(a) 2 Eden, 304.

s. 29, three incumbencies having taken place in the living of Aston-le-Walls, and 130 years having since elapsed, they could not be recovered back. *Croughton v. Blake* (a) is an authority to shew that the decree of the Court of Exchequer in equity in *Thorpe v. Mattingley* cannot bind the defendant, as, by the decision of the House of Lords, the defendant in that case was not properly a party to the suit. In that case a question arose, whether, on a bill filed against certain occupiers for subtraction of tithes, and praying an account, a decree against the occupiers (the defendants in the suit) would be good against others not parties to the suit; and the Court clearly held that it would not. It was there said in argument, that a decree in such a suit decided nothing more than that the defendants must pay the tithes; that it did not decide the right to tithe at all; to which *Parke, B.*, answered, "At all events it only decides it as to those parties. It would be a great injustice if a decision, which binds only four or five parties, could be made, by construction of the act, to extend to the whole of the township." The decree, therefore, of the Court of Exchequer in *Thorpe v. Mattingley* amounts to nothing, and it was totally reversed by the House of Lords.

Then, as to the argument on the 3rd section, that this act is available for the plaintiff, because he had commenced a suit relative to this matter within the year: the answer to that is, that the act is available also as a defence to every person who has not been made a defendant within the given time. Otherwise there would be this absurd distinction between two persons, one of whom was plaintiff within a given period, and the other was not made a defendant within the same period,—that the act would be available to one and not to the other. The words import that a proper suit must be brought within a given period of time. It

1845.
THORPE
v.
FLOWDEN.

(a) 12 M. & W. 205.

1845.
 THORPE
 v.
 FLOWDEN.

is not necessary for the defendant to contend that the suit must be successful, but only that he is entitled to the benefit of this composition, unless a proper suit be commenced against him within that period to set it aside. [*Parke, B.* According to your argument, we must say no more about *Thorpe v. Mattingley*.] No; for that case is not consistent with the decision subsequently given in the House of Lords. It is clear that this agreement is validated by the statute; and the grounds relied upon by the plaintiff are taken from under him by the decision of the House of Lords. The commissioner was therefore bound, by force of the statute and the decree of 1715, to recognize that decree as the last decree affecting equally the right to the tithes and the composition; and the defendant is entitled to have the verdict entered in his favour.

Crompton replied.

PARKE, B.—Any doubt I have entertained in this case has been entirely removed by the very able argument of Mr. *Bethell*; and there now seems to me, in reality, to be no difficulty about this question. It appears to me, that, reading the 2nd and 3rd sections of this act in their ordinary and grammatical sense, they are very clear, and there is no necessity for making an alteration in a single word, in order to make them intelligible and consistent.

The 2nd section enacts, "that every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in any suit to which the ordinary, patron, and incumbent were parties, and which hath not *since* been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law."

The ordinary meaning of these words is, that every such composition, so made or confirmed, should be rendered valid

law by the operation of the act, and from the time of passing it, if it had not been set aside, abandoned, or departed from *since* the making or confirming, and *before* the act. And that this is the true construction of this part of the clause, is confirmed by the provision which follows, which enacts, that "no modus, exemption, or discharge shall be deemed to be within the act, unless it shall have been acted upon at the time of, or within one year next before the *passing of the act*."

The validity or invalidity of the composition or modus is to be determined according to the condition of things at the date of the statute; but, as this provision would preclude all further questions, and most materially affect the rights of tithe proprietors, the Legislature proceeds, in the following section (the 3rd), to provide a remedy, by enacting, "that the act shall not be prejudicial or available to or for any plaintiff or defendant in any action or suit already commenced, or which may be commenced during the present session of Parliament, or within one year after the end thereof."

Any tithe-owner is thus enabled to commence and carry on a suit to its proper termination, without being in the least affected by the former enactment, and in such a suit, but in such a suit only, the law must be administered as it stood before the passing of this act; and the tithe-owner would thus be enabled to secure his rights by the prompt commencement of a suit properly calculated to establish them. A doubt occurred to me, from my insufficient acquaintance with the proceedings of the courts of equity, whether a suit could be framed so as to obtain complete justice, by setting aside the composition altogether; for I had supposed that a bill could merely be filed against the then occupiers to have an account of the bygone tithes; and if so, there would be no remedy for the future tithes against future occupiers by subsequent suits, and a great wrong would be done to the tithe-owners; and, to obviate

1845.
 THORPE
 v.
 FLOWDEN.

1845.
THORPE
v.
FLOWDEN.

such a mischief, it would have been proper to alter the grammatical construction of the two sections in question. But Mr. *Bethell* has satisfied me, and he is confirmed by the information of my Brother *Rolfe*, that a suit might be instituted by the parson, against the owner of the land and all proper parties, to set aside the decree altogether, and so deprive it of any binding effect in any subsequent suit for tithes. This consideration removes all necessity of modifying the language of the 2nd and 3rd sections, so as to obviate the hardship on the tithe proprietor; and the observation of Mr. *Crompton*, that it would be a hardship that he was to be bound by the result of a single suit, in which he might be defeated by a technical error, is of no weight. It is only an additional reason for his taking care to frame his bill with proper parties, and in a proper form, as well as in due time.

I see, therefore, no good reason for adopting the construction of Mr. *Crompton*, that the word "since" is to be read as meaning since the decree, and up to the time of the commencement of the suit in which the right to the tithe in kind should be questioned; and, indeed, if such an interpretation were adopted, it would afford a ready means of defeating the act, by enabling the tithe-owner to abandon the composition at any time, before he chose to sue for tithe in kind.

I am therefore of opinion, that the words of the statute, in their ordinary sense, are plain and clear, and lead to no such mischief or inconvenience as to require any modification of its language.

As to the case of *Thorpe v. Mattingley*, it must be admitted that it cannot now be supported.

It seems to me, therefore, in the present case, that, notwithstanding the suit which was instituted by the plaintiff, the 2nd section remains in full operation, and the plaintiff is deprived of his right to recover tithes in kind.

The only remaining question is, whether the objection,

now for the first time taken by Mr. *Crompton*, can prevail, that the agreement of 1711 is not a composition for tithes within the meaning of the statute. I do not think that we ought to be confined to the narrow construction which he seeks to put upon these terms. Here there was land and an annual payment of money given for tithes and glebe, and together of greater value than the tithes and glebe: this is certainly a composition for tithe, though it is impossible to say how much was given for the tithe. Whether it be such as to give a valid title to the glebe, is not necessary now to be decided. I am of opinion, that, under these circumstances, our judgment must be for the defendant.

1845.
THORPE
v.
FLOWDEN.

ALDERSON, B.—I am of the same opinion. It would make no difference, for the purpose of the decision of this case, whether the decision in *Thorpe v. Mattingley*, which came before me in equity, had been supported, instead of being, as it was, reversed by the House of Lords.

I think this composition, in the first place, is a composition for tithes, and though it extends beyond that, and goes so far as to include an exchange of the glebe, and perhaps may not be valid as to the exchange of the glebe, still it is equally a composition for the tithes, and is now become valid by the operation of Lord *Tenterden's* Act. What is the effect of that act? It applies to compositions for tithes which were in existence when that act passed, and which had not then been set aside, abandoned, or departed from; and the intention of it was, that all such compositions should be confirmed and made valid in law. This, then, was a composition never set aside, and never abandoned or departed from; and therefore it is made valid by the 2nd section. Then, is there any other clause by which parties are enabled to avoid the injustice that would have been done by an enactment of that kind

1845.
 {
 THORPE
 v.
 FLOWDEN.

coming suddenly on them, when they might be reasonably expected to have relied on the existing state of the law, by which at any time they might have set aside such compositions, and as to whom, therefore, such an enactment would be an *ex post facto* law? Is there a reasonable provision for their case? It seems to me that the 3rd section is a reasonable provision for their case; for it enabled parties to institute a suit to set right that wrong which the 2nd section would otherwise have done, provided such suit were commenced within one year after the end of the then session of Parliament: that time was, therefore, given, in which to do something to set aside, or cause to be abandoned or to be departed from, any composition for tithes which was in existence, and which otherwise would by the act be made valid and confirmed. That is to be done in the way Mr. *Bethell* suggests, by instituting a proceeding in equity to set such a composition aside; and, if done within twelve months, then, as far as the act is concerned, the composition for tithes, if it was invalid before, will remain so; and when once it is set aside, it cannot be set up again in any way whatever; it must cease to have an existence. But that was not all, for there might also have been suits instituted, as was the case of *Thorpe v. Mattingley*, merely for the recovery of the tithes; or there might have been an action brought, under the statute of Edward the Sixth, for not setting out tithes: and the 3rd section also provides, that, as to any plaintiff or defendant in suits of that description, the act shall not be prejudicial to the one, or available to the other. Therefore, as to suits for the recovery of tithes, parties under the 3rd section are enabled to recover them, and they have the opportunity, under the same section, of instituting a suit for the purpose of setting aside the composition altogether. The literal meaning of the 2nd section is this, that compositions in existence at the time, and which

had not been set aside, abandoned, or departed from at the time of the passing of the act, should be confirmed. Why should we give other than this construction to the 2nd section? Why should we not give a literal meaning to the words of the act, if we can do so without its leading to an absurdity? Then, no such suit having been instituted here, this composition for tithes is made valid by Lord *Tenterden's* Act.

It appears to me, therefore, that in this case our judgment should be for the defendant.

PLATT, B.—I also think that our judgment should be for the defendant. Certainly, in the outset of the case, I did not feel much difficulty about this act of Parliament; but if there was any doubt, Mr. *Bethell* has dispersed it. The 1st section of the act provides as to what prescriptions or claims of modus should be valid in law; and in one branch of the section, it provides, that, if evidence be given shewing payment or render of such modus for thirty years, that shall be sufficient. Then there is a second branch of the section, which applies to this case, that evidence may be given of a like consistent payment during sixty years, which, if admitted, is held to be infeasible, unless it be shewn to have been made under some agreement between the parties. It was very naturally felt by the Legislature, that where the incumbent, patron, and ordinary had all concurred in a certain arrangement, and that arrangement had been sanctioned by a court of justice, it would be very hard to let all those cases loose, because the agreements might not be strictly valid in point of law; therefore the Legislature interfered by this statute, and enacted, “that every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which

1845.
THORPE
v.
FLOWDEN.

1845.
 THORPE
 v.
 FLOWDEN.

hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law." Now certainly, if, an agreement of this kind having been entered into, it had been set aside by a court of equity, or if it was abandoned by both parties, or if it was departed from, in any of those cases, it was intended that the matter was not to be confirmed and made valid in law. A limit, however, was to be put, and therefore the next section follows—"that this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action, relating to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of Parliament, or within one year from the end thereof." Therefore the act gave them a period of time, during which they might make their election whether they should take proceedings in equity to set aside the agreement they meant to abandon; and in that the Legislature took care of the parties interested on both sides—it quieted the claims of the parties to compositions, which, though very fair and equitable, nevertheless might not be strictly valid in law, unless they should be litigated within a year; and surely no great injustice could be done by that; if it was likely to effect any injustice, the parties interested would have come forward and protested against it, or, as *Mr. Bethell* has suggested, there is a period of time given to the parson, the ordinary, or the patron, in which to get rid of this agreement, if any of them desire to get rid of it. In this case they have not done so, and must therefore be bound by the agreement.

As to the question, whether this is a composition for tithes or not, I could not understand the learned counsel's argument, in contending, that, by reason of the agreement embracing something else than tithe, it was therefore void. I take it to have been clearly a composition for tithes, and

coming within this section of the act of Parliament. It seems to me, therefore, that the objections taken by the learned counsel for the plaintiff cannot be sustained; and, on the whole, I think the judgment should be for the defendant, and that the agreement must be taken to be valid.

1845.
THORPE
v.
FLOWDEN.

PARKE, B.—I ought to mention, that my Brother *Rolfe*, who was obliged to leave the Court, was clearly of opinion that the defendant was entitled to judgment.

Judgment for the defendant.

1845.

July 9. **MACINTOSH v. THE MIDLAND COUNTIES RAILWAY COMPANY.**

In an action of debt to recover a sum of money under two deeds of covenant, the declaration alleged, that, by an indenture of the 19th of December, 1837, in consideration of the sum of 258,629*l.* 10*s.* 6*d.*, the plaintiff covenanted with the defendants to make and complete a certain portion of a certain railway, and to provide bars or rails and chairs, on or before the 1st of May, 1840; that afterwards,

DEBT.—The declaration stated, that heretofore, to wit, on the 19th of December, 1837, by an indenture then made between the said Company of the one part, and the plaintiff of the other part, after reciting (*inter alia*) that the said Company had, under the powers of their act of Parliament, determined to make a railway, commencing in Rugby, in the county of Warwick, and terminating in the township of Long Eaton, in the county of Derby; and that the plaintiff was willing to contract with the Company to execute the works described in certain specifications, &c. of the engineer of the Company, &c.; and that the Company had agreed to advance to the plaintiff, from time to time during the progress of the works so contracted to be executed by him, sums of money by way of instalments upon account of and in part payment for the works then actually done and executed by him, &c., such execution to

by another indenture of the 23rd of March, 1839, in consideration of the further sum of £15,000, the plaintiff covenanted with the defendants, that he, the plaintiff, being provided by them with railway bars or rails and chairs for temporary and permanent use, would complete the said portion of the said railway, and the line of the permanent railway, on or before the 1st of June, 1840; provided, that, if the said plaintiff should not complete the said railway by the said 1st of June, 1840, he should pay to the said defendants the sum of £300 for the said 1st of June, and the like sum for every succeeding day, until the whole should have been completed, but so that the total amount to become forfeitable should not exceed the sum of £15,000. Breach, that the defendants detained from, and did not pay the plaintiff a large sum, to wit, £20,000, parcel of the sum due to the plaintiff. Plea, as to £7500, parcel of the said sum of £20,000, that the said sum of £7500 is parcel of the said sum of £15,000 agreed to be retained by the defendants; that the plaintiff did not complete the said railway on or before the 1st of June, 1840, nor until twenty-four days after, whereby the plaintiff then became liable to pay to the said defendants the sum of £300 for the 1st day of June, and the like sum for every such succeeding twenty-four days during which the railway remained incomplete, by reason of which the defendants deducted and retained the said sum of £7500 out of the monies payable by them to the plaintiff.—Replication, that the plaintiff did not become nor was liable to pay the defendants, *modo et formâ*.—At the trial, it was proved that the plaintiff did not finish the railway until twenty-four days after the 1st of June, but that the defendants had not provided the plaintiff with the bars, rails, and chairs in sufficient quantity to enable him to complete it by that day. The learned judge told the jury that the defendants were bound, as a condition precedent to their right to deduct the £7500, to furnish the plaintiff with such bars, rails, and chairs:—*Held*, that that was a misdirection; that the covenants were independent; and that the furnishing of the bars, rails, and chairs was not a condition precedent to the right of the defendants to make the deduction; and that, the only question being whether the railway was completed on the 1st of June, the plea was established.

be certified by the resident engineer of the Company for the time being; and that, upon completion by him of the works so to be executed, and upon the maintenance thereof by him for one year, such completion and maintenance also to be certified as thereafter mentioned, he the plaintiff was to receive the remainder of the monies due to him upon the said contract: It was witnessed, that, in consideration of 258,629*l.* 10*s.* 6*d.*, agreed to be paid by the said Company in manner thereafter mentioned, he the plaintiff covenanted with the said Company and their successors to make and complete a portion of the said railway, (therein particularly described), and to provide (inter alia) all such railway bars or rails and chairs as might be necessary for temporary use in the construction of the works, except such railway bars or rails and chairs as were thereafter covenanted to be provided by the said Company, and to complete the said works, and to deliver over the same so completed to the said Company, on or before the 1st day of May, 1840, and to maintain the said railway for one year thereafter. And it was by the said indenture further witnessed, that, in consideration of the premises, the Company covenanted with the plaintiff that they should and would pay the said sum of 258,629*l.* 10*s.* 6*d.*, or such other sum as should become payable to the plaintiff, at the times and in manner following; (that is to say), at the expiration of four weeks from the day on which the works should have been commenced, or within fourteen days thereafter, nine tenth parts of the whole amount or value of the works and materials which should have then been executed and provided by the plaintiff; and so from time to time, at the expiration of every succeeding four weeks, until the sums retained in the hands of the Company should amount to £10,000, they should in like manner pay to the plaintiff nine tenth parts of the whole amount or value of the said works and materials then actually performed and provided; and, from the time when the sums so retained should amount to

1845.
MACINTOSH
v.
MIDLAND
COUNTIES
RAILWAY Co.

1845.
MACINTOSH
v.
MIDLAND
COUNTIES
RAILWAY Co.

£10,000, they should, at the expiration of every succeeding four weeks, pay to the plaintiff nineteen twentieth parts of the whole amount of such work and materials which should have been performed or provided during the next preceding four weeks, until the whole sums retained by the Company should amount to £15,000; after which time the Company should, at the expiration of every succeeding four weeks, until the whole of the works should have been executed, pay to the plaintiff the full amount or value of the works and materials performed and provided during the next preceding four weeks; and should, at the expiration of three calendar months after the whole of the works should have been completely finished by the plaintiff, to the satisfaction of the principal engineer of the Company, pay to the plaintiff four-fifths of the whole sum retained by them, and the remaining one-fifth at the expiration of one month from the date of the engineer's certificate that the said railway had been well and substantially maintained by the plaintiff for one year. And it was thereby agreed, that the Company should find and provide for the plaintiff, for his temporary use in the construction of the works, a portion of the permanent bars or rails and chairs, and that the plaintiff might use the same for laying temporary roads or railways to be used in the execution of the works; and that the Company should deliver the same in twelve equal monthly quantities, commencing on the 1st of January, 1839, and so on, on the first day of every succeeding month, until the whole should have been delivered, &c. The declaration then stated, that, by another indenture, made between the Company of the one part, and the plaintiff of the other, dated 23rd of March, 1839, reciting that the plaintiff had further agreed to contract with the Company for laying the permanent line of railway on the portion of the railway comprised in his contract, and that he had agreed to expedite the works, so that the whole line of the railway might be opened for the use of the public on the 1st of June, 1840, in

consideration of the Company agreeing to pay him the further sum of £15,000, in addition to the said sum of 258,629*l.* 10*s.* 6*d.*, in consideration for such expedition and completing the same as aforesaid: It was witnessed, that, in consideration of the further sum of £15,000, the plaintiff covenanted with the Company, that he, the plaintiff, being provided by the Company with railway bars or rails, chairs, &c., for temporary and permanent use as thereafter mentioned, would complete the said portion of the said railway, and the line of the permanent railway, on or before the said 1st of June, 1840, &c. Provided, that, in addition to the permanent railway bars or rails and chairs, which had been delivered or agreed to be delivered in pursuance of the original contract, for the plaintiff's temporary use in the construction of the works, and which thereby were declared to amount to 300 tons, the Company should and would, at their own costs and charges, provide and deliver, at &c., all such further railway bars or rails, chairs, &c., as should be requisite or necessary for making and completing the said permanent way, in such quantities and at such times as thereafter mentioned; viz. 300 tons on or before the 1st of April, 1839, 300 tons on or before the 1st of May, 300 tons on or before the 1st of June, 300 tons on or before the 1st of July, 450 tons on or before the 1st of August, 500 tons on or before the 1st of September, 500 tons on or before the 1st of October, 300 tons on or before the 1st of November, and 300 tons on or before the 1st of December following. And the Company thereby covenanted with the plaintiff to pay him the said additional sum of £15,000 as the consideration for his so expediting the works, and completing the whole of the said railway by such time as before mentioned, subject nevertheless to such deductions thereout as thereafter mentioned, by such monthly instalments, in respect of the works and materials from time to time actually performed and provided, as by the original contract the said sum of 258,629*l.* 10*s.* 6*d.* was made payable, and as if the said sum

1845.
 MACINTOSH
 &
 MIDLAND
 COUNTIES
 RAILWAY Co.

1845.
 MACINTOSH
 v.
 MIDLAND
 COUNTIES
 RAILWAY CO.

of £15,000 had originally formed part of the consideration for the original contract. Proviso, that, in case the plaintiff should not complete the whole of the said railway on or before the said 1st day of June, 1840, so that it might be capable of being opened by the said Company for the use of the public on that day, then and in such case the plaintiff should and would, on demand, pay to the said Company the sum of £300 for the said 1st of June, and the like sum for every succeeding day (Sundays only excepted) until the whole of the said railway should have been so made and completed, and delivered over to the said Company capable of being opened by them to the public as aforesaid; but so, nevertheless, that the total amount to become forfeitable or payable by the said plaintiff should not exceed in the whole the sum of £15,000. Averment, that the plaintiff did, to wit, on the 20th day of March, 1839, and on divers days and times between that day and a certain day and year, to wit, the 1st day of June, 1840, make and complete the whole line of the said railway. Breach, that the defendants detained from and did not pay to the plaintiff a large sum, to wit, the sum of £20,000, parcel of the sum due to the plaintiff, &c.

Fifth plea, as to the sum of £7500, parcel of the said sum of £20,000, that the said sum of £7500 was and is parcel of the said sum of £15,000 so agreed to be retained by the defendants as aforesaid; that the plaintiff did not complete the said railway, and deliver the same to the defendants, so as that it might be capable of being opened for the use of the public on or before the 1st day of June, 1840, nor until the expiration of twenty-four days thereafter (excepting Sundays), whereby the plaintiff then became liable to pay to the said defendants, on demand, the sum of £300 for the said 1st of June, and the like sum for every of such succeeding twenty-four days (Sundays excepted) during which the said railway remained incomplete and undelivered over to the defendants; by reason of which the defendants deducted and retained the said

sum of £7500 out of the monies payable by them to the plaintiff.

Replication, that the plaintiff did not become nor was liable to pay the defendants on demand, in manner and form &c.

1845.
MACINTOSH
v.
MIDLAND
COUNTIES
RAILWAY Co.

At the trial of the cause, before *Pollock*, C. B., at the sittings in London after last Hilary Term, the deeds set forth in the declaration were proved; and it was also shewn that the plaintiff did not complete the portion of the railway in question until the lapse of twenty-four days after the 1st of June, 1840, but that he was not supplied by the defendants with bars or rails and chairs at the times and in the quantities specified in the deed of 23rd of March, 1839, nor in sufficient quantities to enable him to complete it by the 1st of June, 1840. It was contended for the defendants, that they were nevertheless entitled in this action to deduct the sum of £7500 from the £15,000 payable to the plaintiff under the deed, being after the rate of £300 per day from the 1st of June, 1840, subsequent to the day when the work was in fact completed, and that the remedy against them for the non-supply of the rails and chairs was by a cross action: and evidence was also tendered on behalf of the defendants, to shew that the non-supply of the rails and chairs was not the *sole* cause of the non-completion of the work in due time. The Lord Chief Baron was however of opinion, that the supply by the defendants of a sufficient number of rails and chairs to enable the defendant to complete the work by the 1st of June, 1840, was a condition precedent to their right to make any deduction from the £15,000; and he therefore rejected the evidence tendered, and under his direction a verdict was found for the plaintiff for the whole amount claimed by him.

In Easter Term *Kelly* obtained a rule nisi for a new trial, on the ground of misdirection, and of the exclusion of the above evidence, or for arresting the judgment; against which cause was shewn in Trinity Term (May 6) by

1845.
 MACINTOSH
 v.
 MIDLAND
 COUNTIES
 RAILWAY CO.

Martin, Cowling, and Montague Smith.—The question in this case turns altogether on the construction of the deed of the 28rd of March, 1839. It was admitted that the rails and chairs were not supplied by the defendants strictly according to the stipulations of the deed; but it was said, that, inasmuch as it could be shewn that the non-supply of them was not the sole cause of the non-completion of the railway on the day mentioned in the deed, the penalty attached. [*Pollock, C. B.*—I thought the defendants were in the same condition as they would have been in an action for the penalty, and that they could not have sued for the penalty until after the supply of the rails and chairs according to the terms of the deed.] There can be no doubt, that, in an action for the penalty, the supply of rails and chairs pursuant to the deed would have been a necessary averment. The defendants say, first, that the fact of the railway being completed on the 1st of June, 1840, was a condition precedent to the plaintiff's right to receive the £15,000. But that clearly is not so. The £15,000 is payable *month by month* during the progress of the work; and it is absurd to say that the payment of the whole of that sum could depend on the performance of a matter in the year 1840 as a condition precedent. It is all by way of *proviso*, and is a condition *subsequent*. But, further, the supply of the rails and chairs on the days mentioned in the deed is a condition precedent to the attaching of the penalty. The covenant of the plaintiff is, that, *on being* provided by the Company with bars or rails and chairs, at the times and in the manner therein mentioned, he will complete the work on or before the 1st of June, 1840. Could a declaration be framed against him upon this covenant, without an averment that they were supplied on those days? Clearly not. The quantity to be delivered varies in the different months, no doubt because it was more convenient, and because labour could more beneficially be applied to the work in certain months than in others. Besides, the deduction of the penalty is to be

made, not out of the £15,000 alone, but out of the entire sum payable to the plaintiff under both deeds. *Holme v. Guppy* (a) is an authority to shew how such a stipulation as this is to be construed, and that the party seeking to enforce a penalty of this kind must bring himself strictly within the terms of the contract.

1845.
MACINTOSH
v.
MIDLAND
COUNTIES
RAILWAY CO

Peacock, (with whom was *Kelly*), contra.—It is not necessary absolutely to argue that the supply of the rails and chairs by the defendants was not a condition precedent; although the defendants contend that these are independent covenants by the plaintiff to complete the work by a certain day, and by the defendants to pay the £15,000 in the manner mentioned in the deed; subject to a proviso, that, if the work be not so completed, the defendants shall be at liberty to deduct a portion of the price so to be paid for expedition. The question is, if the company covenant to pay him £15,000 for doing a particular act, are they bound to pay him the whole of that sum if he fails to do it? But here the question arises on the plaintiff's replication to the fifth plea, in which he merely alleges that he did not become nor was liable to pay the defendants on demand, modo et formâ. Under that replication, he cannot give any new facts in evidence. Now it is established in evidence that he did not in fact complete the works on the day stipulated for. He says it was because the defendants did not furnish the rails and chairs according to the terms of their contract. But his replication does not state that, but merely says that he was not liable to pay the penalty as alleged in the plea; that is, either that he was not liable by reason of the facts alleged in the plea, or that those facts were not true. Could he, under this replication, have given evidence of a *release* from the penalty? Clearly not. [*Alderson*, B.—It may be a bad plea, but it

(a) 3 M. & W. 387.

1845.
 MACINTOSH
 v.
 MIDLAND
 COUNTIES
 RAILWAY CO.

would seem that it was proved in fact. On these pleadings, there is no issue as to whether there was a due supply of rails and chairs, or not. The plea is proved simply by shewing that the plaintiff did not complete the work on the day mentioned.] Yes; and moreover, the plaintiff, in his declaration, alleges his right to receive the £15000 because he *did* complete the work by the 1st of June, 1840. If, therefore, his replication had alleged that he did *not* so complete it, because he was not duly supplied with rails and chairs, that would have been a departure. He ought to have alleged in his declaration a dispensation with the completion of the work on that day, by reason of the non-supply of the rails and chairs. The defendants are, therefore, entitled to the verdict on this issue.

The Court called upon the plaintiff's counsel to address themselves to this point. The case accordingly stood over for this purpose until the following day (May 7th), when it was further argued by

Cowling for the plaintiff, and *Peacock* for the defendants, on the question whether, assuming the due supply of the rails, &c. to be a condition precedent, the non-compliance with it could be gone into on the issue raised by these pleadings; but the Court having ultimately come to the conclusion that it was not a condition precedent, it is not necessary to detail the argument at length. The following cases were cited and relied upon on behalf of the plaintiff:—*Collins v. Gibbs* (a), *Serjt. Williams's note to Stennell v. Hogg*, 1 Saund. 228 a, *Edge v. Pemberton* (b), *Whitworth v. Hall* (c), *Mellor v. Baddeley* (d), *Rawlin v. Danvers* (e), and *Woodham v. Edwards* (f). For the de-

(a) 2 Burr. 899.

(b) 12 M. & W. 187.

(c) 2 B. & A. 695.

(d) 2 C. & M. 675.

(e) 5 Esp. 38.

(f) 5 Ad. & Ell. 771; 1 Net. & P. 207.

fendant, *The Bishop of Meath v. The Marquis of Winchester* (a) was cited, and the case of *Collins v. Gibbs*, and the doctrine laid down in the note to *Stennell v. Hogg*, were distinguished. *Platt, B.*, also referred to *Sicklemore v. Thistleton* (b).

1845.
MACINTOSH
v.
MIDLAND
COUNTIES
RAILWAY CO.

Cur. adv. vult.

The judgment of the Court was now pronounced by

ALDERSON, B.—In this case we think there should be a new trial.

The question turns upon the fifth plea to the declaration. [His Lordship stated the substance of the declaration, and continued.] To this declaration, the fifth plea of the defendants, which is pleaded as to £7500, part of the sum demanded, states in substance, that the plaintiff did not complete the railway on the 1st of June, 1840, according to the terms of the second indenture, and that, in consequence of his failing to do so for the space of twenty-four days, exclusive of Sundays, the defendants had the right of deducting from the sum to be paid to him certain sums amounting altogether to the sum of £7500.

The replication to this plea denies only that the plaintiff was liable to pay in manner and form as in the plea is alleged. The question is, what is the issue thereby raised? The Lord Chief Baron, at the trial, thought that the defendants were bound, as a condition precedent to their right of deducting any part of the £15,000, to furnish the plaintiff with the materials stipulated for, in the manner and at the times mentioned in the second indenture, and that, as they had not done so, (which question the jury have found for the plaintiff), the failure of the plaintiff to complete on the 1st of June, 1840, did not make him liable to the deductions on which the defendants insisted.

(a) 3 Bing. N. C. 183 ; 3 Scott, 561.

(b) 6 M. & Selw. 9.

1845.
 MACINTOSH
 v.
 MIDLAND
 COUNTIES
 RAILWAY CO.

But, after fully considering this question, we think that the true construction of the deed, and the true question raised by these pleadings, is only whether the railway was completed on the 1st of June, 1840, and that, if not so completed, the plaintiff became liable to allow the daily deduction of £300 for the non-completion; and that the fifth plea was in truth made out, if the number of days for which the deduction was claimed was established. The covenant on the plaintiff's part is absolute, to complete on a given day, or to pay £300 daily if he does not. Any other construction would lead to the conclusion, which we think an unreasonable one, that the non-supply of a single rail or chair by the time specified for its delivery, although in the result wholly immaterial to the facilities for completion, would entitle the plaintiff to receive the £15,000 given for expedition money, without his giving the expedition for it. On the other hand, by treating the covenant as independent, it is open to the plaintiff, if he has really been prevented from completing the railway in due time by the defendants' neglect, to bring his action against them for that breach of their covenant. In such an action, it will be open to the jury to give him full redress for all the damages (including these deductions, if caused by the defendants' neglect) which the plaintiff may have sustained, and in this way equal justice will be done to both parties.

Upon the whole, therefore, we have come to the conclusion that this is the proper construction to be put upon the second indenture, and the covenants contained in it, and that this is the issue raised by the replication to the fifth plea.

We think, therefore, that there should be a new trial.

Rule absolute for a new trial.

1845.

BRADBURN V. BOTFIELD.

July 9.

COVENANT.—The declaration stated, that, at the time of the demise thereafter mentioned, Sir E. Winnington and J. A. Addenbrooke were seised in their demesne as of fee of one undivided fourth part of the demised premises; that Mary Whitby was seised of one other undivided fourth part, and that W. Townsend was seised of two other undivided fourth parts; and thereupon, by an indenture of lease, of the 1st of October, 1801, made between the Honourable E. Foley and Eliza Maria his wife, of the first part; the said Sir E. Winnington and J. A. Addenbrooke, of the second part; Mary Whitby, of the third part; Sarah Townsend, widow, relict of Gilbert Townsend, deceased, of the fourth part; George Townsend, only son and heir-at-law of the said Gilbert Townsend, of the fifth part; the defendant and Thomas Botfield and Beriah Botfield, of the sixth part; after reciting, that, by virtue of an indenture of bargain and sale, dated the 13th of August, 1793, and made between the said Edward Foley and Eliza Maria his wife, one of the three co-heirs of Thomas Hoo, Esq., deceased, of the one part, and Sir E. Winnington and J. A. Addenbrooke, of the other part, and also by virtue of a fine levied in pursuance thereof, one fourth part or share of the premises thereafter stated to be demised stood limited unto and to the use of the said Sir E. Winnington and J. A. Addenbrooke, their heirs and assigns for ever, in trust (inter

A declaration in covenant stated, that, by indenture of lease, Sir E. W. and J. A. A., (who were seised in fee of an undivided fourth part of the premises in trust for E. M. F.), E. F. and E. M. F. his wife (the cestui que trusts), M. W., who was seised in fee of another undivided fourth part, W. T., who was seised in fee of half, and G. T. and S. T., who had equitable interests in that half, jointly demised, according to their several estates, rights, and interests in certain coal-mines, to the defendant and two others, yielding and paying certain rents to the said E. F., E. M. F., Sir E. W., J. A. A. M. W., S. T., G. T., and W.

T. respectively, and to their respective heirs and assigns, according to their several and respective estates, rights, and interests in the premises; that the defendant and the two other leasees covenanted with all the above parties, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns, respectively, at the end of the term, and to work the mines properly. The declaration then deduced to the plaintiff a title to the moiety of the said W. T., and alleged as breaches the non-repair of the premises, and the improper working of the mines.—Plea, that J. A. A. was the survivor of all the covenantees:—*Held*, that the covenants were joint, and not several, and that the surviving covenantee ought to have brought the action.

Quere, whether one of several tenants in common, lessors, can sue on a covenant to repair made with all.

1845.
 {
 BRADBURN
 v.
 BOTFIELD.

alia) for such persons and for such estates, &c., as the said Eliza Maria Foley should by deed or will appoint; and also reciting that the said Mary Whitby was seised in fee of one other undivided fourth part of the same premises; and further that, by indenture dated the 23rd of January, 1784, and a fine levied pursuant thereto, one undivided moiety of the same premises were limited unto and to the use of Gilbert Townsend and William Townsend, their heirs and assigns for ever, in trust, as to the estate of the said William Townsend, for the said Gilbert Townsend, his heirs and assigns for ever: it was witnessed, that the said Sir E. Winnington, J. A. Addenbrooke, E. Foley, Eliza Maria Foley, Mary Whitby, William Townsend, Sarah Townsend, and George Townsend, according to their several and respective estates, rights, and interests in the tenements thereby demised, did demise to the defendant, and to the said Thomas Botfield and B. Botfield, a certain messuage, buildings, and several closes of land, with all and every the mines and veins of coal and iron-stone lying and being under the said several closes, with full power for the defendant and the said T. Botfield and B. Botfield, their and each of their executors, administrators, and assigns, their and each of their agents, &c., to work the said mines and veins of coal and ironstone, &c.: to hold the said messuage and buildings and closes of land, and to hold, use, exercise, and fully enjoy all and every the said mines, &c., unto the defendant and the said Thomas Botfield and Beriah Botfield, their executors, &c., for the term of sixty years, yielding and paying unto the said Edward Foley and Eliza Maria Foley his wife, Sir E. Winnington, J. A. Addenbrooke, Mary Whitby, Sarah Townsend, George Townsend, and William Townsend respectively, and to *their respective heirs and assigns, according to their said several and respective estates*, rights, and interests in and to the said premises, the yearly rents and reservations therein mentioned. And it was by the said indenture further witnessed,

that, in consideration of the said demise, the defendant and the said T. Botfield and Beriah Botfield, and every of them, did thereby for themselves and himself, and their and his joint and several heirs, executors, &c., covenant and agree to and with the said E. Foley and E. M. Foley his wife, Sir E. Winnington, J. A. Addenbrooke, Mary Whitby, Sarah Townsend, George Townsend, and William Townsend, *and each and every of them, their and each and every of their heirs, executors, administrators, and assigns*, in manner following, viz. to keep the said messuage and buildings, and also all and every the furnaces, fire-engines, ironworks, dwelling-houses, and other erections and buildings, in good and sufficient repair, and the same, so repaired, to deliver up at the end or other determination of the said lease to the said lessors (naming them), and their heirs and assigns respectively. There were also covenants to work the mines, &c., in a proper and workmanlike manner. There was also a proviso, that if the defendant and the said T. Botfield and B. Botfield should be desirous of determining the lease at the expiration of any one year, and should signify such their intention by notice at least one year before the expiration of any one year of the said term, then the said lease should cease and determine. The declaration then stated the entry of the defendant and the said T. Botfield and Beriah Botfield into the demised premises, and that they became and were possessed thereof for the said term, and so continued until the 25th of March, 1842, when the said term of sixty years was determined by a notice to quit, given by the lessees pursuant to the power to them given by the lease. The declaration then stated the death of Gilbert Townsend, and deduced a title to the plaintiff as assignee of the moiety of the said William Townsend. It then assigned for breaches, that the defendant and the said T. Botfield and B. Botfield did not keep the premises in repair, nor so yield them up at the determination of the lease, and did not work the mines in a proper and workmanlike manner.

1845.
 BRADBURN
 v.
 BOTFIELD.

1845.
BRADBURN
v.
BOTFIELD.

To this declaration the defendant pleaded, and alleged the death of all the covenantees *seriatim*, except the said J. A. Addenbrooke, who was left them surviving.

General demurrer, and joinder.

The plaintiff's points marked for argument were, that the plaintiff, being the assignee of the reversion of one tenant in common, is entitled to sue alone, without joining the other tenants in common; that the covenants declared on are not only joint with all the covenantees, but also several with each covenantee, and that on the several covenants the plaintiff may sue alone; that the objection of the non-joinder of the other covenantees ought to be raised by a plea in abatement; that the order of time in which the lessors and covenantees died, and the survivorship of John A. Addenbrooke, as stated in the last plea, do not affect the right of the plaintiff to sue for breaches after the conveyance of the reversion to him.

The defendant's points were, that the plea is good, as it shews the right to sue upon the covenants to be out of the plaintiff; and that the declaration is bad, as it does not shew any right to sue upon them in the plaintiff. That the covenants are joint, and could only be put in suit by all the covenantees, or the survivors or survivor, or the representative of the survivor. That the plaintiff, not being the original covenantee, can have no right of action, except by virtue of the stat. 32 Hen. 8, c. 34; but that that statute does not apply to this case. That the reversion in one-fourth of the premises is not shewn to have been ever vested in George Townsend, through whom the plaintiff claims; but is stated to have been granted by William to uses, without specifying the grantees, who may, therefore, have been living at the time of the breaches of covenant alleged in the declaration.

On the 27th of June and 2nd of July,

Unthank argued in support of the demurrer.—The declaration shews that the parties demising were tenants in

ommon, and the demising power was, therefore, separate, and a lease by tenants in common operates as a separate demise by each: *Doe d. Poole v. Errington* (a). The plaintiff was, therefore, entitled to sue alone, for, his interest being several, the covenants are in fact made with each and every of the lessors. The rule laid down in *Windham's case* (b), and in the notes to *Eccleston v. Clipsham* (c), is, that though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be *several* and not joint, the covenant shall be taken to be *several*, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. That rule is somewhat qualified by *Sorsbie v. Park* (d), where it was held, that where the words of a covenant are *expressly* joint, it will be so construed, although the interest may be several, and vice versa; but where the words are ambiguous, they may be construed to be joint or several, according to the interest. That decision, although somewhat questioned by the Court of Queen's Bench in *Hopkinson v. Lee* (e), is in accordance with the doctrine laid down in *Anderson v. Martindale* (f). [Parke, B.—Perhaps the Court of Queen's Bench misunderstood what I said in *Sorsbie v. Park*. When I used the word "joint," I meant *expressly* joint.] It is admitted that, if the interest were joint, it might have been necessary for all the covenantees to join in the action; but here the recitals shew that the interest was several, and that some of the parties, namely, Mr. and Mrs. Foley, had no legal estate whatever. *Slingsby's case* (g) shews that, the interest being several, and the covenants being made with the lessors, and each and every of them, they may sue separately.

1845.

BRADBURN
v.
BOTFIELD.

(a) 1 A. & Ell. 750; 3 Nev. & M. 646.

(b) 5 Rep. 18 a.

(c) 1 Saund. 154.

(d) 12 M. & W. 146.

(e) 14 Law J. Rep. (N. S.) Q. B. 101.

(f) 1 East, 497.

(g) 5 Rep. 18 b.

1845.
 BRADBURN
 v.
 BOTFIELD.

There it was agreed, that "when it appears by the declaration that every of the covenantees hath or is to have a several interest or estate, there when the covenant is made with the covenantees *et cum quolibet eorum*, these words make *cum quolibet eorum* the covenant several in respect of their several interests. As if a man by indenture demises to A. black-acre, to B. white-acre, to C. green-acre, and covenants with them and quolibet eorum that he is lawful owner of all the said acres, &c., in this case, in respect of the several interests by the words *et cum quolibet eorum*, the covenant in the deed is several. But if he demises to them the acres jointly, then these words *cum quolibet eorum* are void, for a man, by his covenant, (if not in respect of several interests), cannot make it first joint, and then make it several by the same or the like words, *cum quolibet eorum*." [Parke, B.—The difficulty is, how are the Foleys to sue?—the introduction of their names makes the difficulty. If all may sue, all must sue.] The words "*cum quolibet eorum*" make it a separate cause of action. [Parke, B.—It may be so as to all of them except those who have no interest at all. *Slingsby's case* appears to be against you there.] All the parties to the indenture might sue, or Winnington and Addenbrooke might sue separately for the Foleys. [Parke, B.—*Hopkinson v. Lee* is precisely in point, and I think is good law. Lord Denman there appears to have mistaken what I said in *Sorsbie v. Park*. I meant to say, where the covenant was *positively* joint. If you covenant with A., B., and C. jointly, and the survivor of them, they must sue jointly on the covenant. It follows from that, that if you join parties to the deed who have no interest, you cannot sever and sue separately.] The covenant, as far as it is joint, is a covenant in gross; then the adding the words "*cum quolibet eorum*" makes it also several. The interest of the Foleys is a several interest as cestui que trusts. [Alderson, B.—Then you get to this vicious argument, that the whole is not equal to its parts.] If this is

a covenant in gross, and all the parties be dead, who is to sue? [*Parke, B.*—The executor of the survivor, who represents the testator. Every covenant is a personal matter, and goes to the executor: *Rennell v. Bishop of Lincoln* (a). This might have done very well if the Foleys had not been covenantees.] In *Slingsby's case* it is also said, "So, if a man make a feoffment in fee by deed to three, and warrant the land to them et quolibet eorum, the warranty is joint and not several; but in such case, if their estates were several, their warranty shall be several accordingly." And in this case, the interest of the covenantees being several, the words "et quolibet eorum" make them separate covenants. [*Alderson, B.*—You must sue in the names of all jointly, or of each separately, in respect of their several interests. The covenants cannot be joint with all, and separate with all, except A. B. *Parke, B.*—You must construe the deed at the time it is dated, and then there is nothing in which Mr. and Mrs. Foley are jointly interested with the rest of the covenantees.] If the whole deed were set out, it would appear that they had a several interest for the rent. [*Parke, B.*—We adopted that course in *Sorsbie v. Park*, to see if there were a separate interest, which would make the covenant several. And if you can amend your case by shewing that there is such an interest, you may do so.]

1845.
BRADBURN
v.
BOTFIELD

[The case was then postponed till Wednesday, July 2nd, when, the learned Barons having been furnished with a copy of the lease, the argument proceeded.]

Unthank, for the plaintiff.—[*Parke, B.*—I do not see any separate covenants in the lease, which give the parties a separate interest, except the covenant as to the rent: all the rest are joint. With regard to the covenant for getting coal, all are equally interested in that covenant.

(a) 7 B. & Cr. 113; 9 D. & R. 810.

1845.
 BRADBURN
 v.
 BOTFIELD.

The covenant here declared upon is to do one thing, namely, to repair the premises. Suppose there were a covenant with four tenants in common to repair, could each sue separately? It is submitted that they could. In *Wilkinson v. Hall* (a), it was held that tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. There *Tindal*, C. J., after quoting Littleton, ss. 316 and 317, says, "So, if there be no joint demise, there must be several actions of debt for rent, for a joint action is not maintainable except upon a joint demise. Here, upon the face of the declaration, it appears that the defendants held a moiety of the premises under one of the tenants in common, and another moiety under the other." And he afterwards adds, "How can two tenants in common have a joint interest in the proceeds of several demises?" [*Parke*, B.—If there is a demise by one tenant in common as to his moiety, and a demise by the other tenant in common as to the other moiety, by the same instrument, and there is a covenant to repair, I want you to shew that each may sue separately.] The difficulty in the cases has been, whether they *may* join. In *Midgley v. Lovelace* (b) and *Kitchen v. Buckly* (c), it was held that they *may* join. And in *Wentworth v. Russell* (d), it was held that an action for pound breach brought by two tenants in common was maintainable, or that one only might have sued. So, in *Johnson v. Wilson* (e), it was held that tenants in common might recover in an action for not performing an award. All the cases, except *Foley v. Addenbrooke* (f), are in favour of the plaintiff. There, however, there was a distinct statement of a joint demise by both. [*Parke*, B.—The joint words, you say, were satisfied, because there was a joint demise.] Yes; but in this case there is a separate demise

(a) 1 Bing. N. C. 713; 1 Scott, 675.

(b) Carthew, 289.

(c) 1 Lev. 109.

(d) 1 Moor, 452.

(e) Willea, 248.

(f) 4 Q. B. 197; 3 G. & D. 64.

by each, and a reservation according to the several interests of the parties; and according to *Tindal*, C. J., in *Wilkinson v. Hall*, where the demises are several, the actions must be several. [*Parke*, B.—*Littleton* says, in s. 316, that, if two tenants in common make a lease to another, rendering to them a certain rent during the term, “the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personality.”] That is where there is a joint demise. There is another point, which was not taken in *Foley v. Addenbrooke*, that, if four persons make a joint lease, and afterwards one part is conveyed away, the others may sever, and, if one sues alone, it can be taken advantage of by plea in abatement only; that is, because there is no variance. That has always been the ground of the decision in these cases. [He cited Serjeant *Williams’s* note to *Cabbell v. Vaughan* (a), *Mountstephen v. Brooke* (b), *Jell v. Douglas* (c), *Whelpdale’s case* (d), and *Addison v. Overend* (e).]

1845.
BRADBURN
v.
BOTFIELD.

J. W. Smith, *contra*.—There is no pretence for saying that this is anything but a joint demise. The demise is joint, and so are the covenants also. But it is said that there are covenants in the other part of the lease which are several, and which may be imported into the case in order to construe those declared upon. They must, however, be construed by themselves, unless there are words of reference to the other covenants. One may be joint, and the other several: *James v. Emery* (f) is an express authority for that. It is impossible that covenants in one part of a deed can be used to render covenants in another part of it several, which would be otherwise joint. The covenants here are made with four persons who had no interest, and four who had an interest; but, even if they had been all tenants in com-

(a) 1 Saund. 291 c.

(b) 1 B. & Ald. 224.

(c) 4 B. & Ald. 374.

(d) 5 Co. 119.

(e) 6 T. R. 766.

(f) 8 Taunt. 245; 2 Moore, 195.

1845.
 BRADBURN
 v.
 BOTFIELD.

mon, the covenants would have been joint, according to *Foley v. Addenbrooke* (a). There, in an action at the suit of Edmund Thos. Foley, the declaration stated, that E. Foley, and E. M. Foley his wife, and Mary Whitby, demised lands and mines (of one undivided moiety, of which Foley and his wife were seised in fee in right of the wife) to the defendant for a term of years, he covenanting with the said E. Foley, E. M. Foley, and Mary Whitby, and their heirs, executors, &c., to erect and work furnaces, to repair the premises, and work the mines; that, during the term, Foley and his wife died seised of the reversion, whereby the same descended to E. T. Foley, the plaintiff, their son and heir. Breaches of covenant were assigned, which were alleged to have been committed since their decease. It was held, on demurrer to a plea that Mary Whitby survived, that the action brought by E. T. Foley, without Mary Whitby, could not be maintained. Lord *Denman*, C. J., in delivering the judgment of the Court, says, "The result of the cases appears to be this: that, where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in terms; but the several interest, and the several grounds of action, must distinctly appear, as in the case of covenants to pay *separate rents* to tenants in common upon demises by them." Littleton, s. 316, is also an authority that the action should be joint. In *Powis v. Smith* (b), *Abbott*, C. J., says, "It is clear that, if there be a joint lease by two tenants in common, at an entire rent, the two may join in an action to recover the same; but if there be a separate reservation to each, then there must be separate actions." In *Wallace v. M'Laren* (c) it was held that, upon a lease by tenants in common, the survivor might sue for the whole rent, although the reservation be to the lessors according to their several and respective interests therein. There the words are very

(a) 4 Q. B. 197; 3 G. & D.
 64.

(b) 5 B. & Ald. 851.

(c) 1 Man. & Ry. 516.

like those in the present lease. And if the parties *might* join, the authorities shew that they must. In *Foley v. Ad-denbrooke*, Lord *Denman* concludes by saying, "The case of *Petrie v. Bury* (a) shews that, if the covenantees *could* sue jointly, they are bound to do so." It is a general rule, that when the covenant is joint, all the obligees and covenantees must sue. If these parties had all been tenants in common, and the covenants joint, they must have joined in the action. But here is a case where four have no interest at all. It is a covenant in gross, and all may sue upon it. To say that several of them may sue, or that four might sue in respect of their several interests, would be to overrule *Hopkinson v. Lee* (b) and *Anderson v. Martindale* (c). In *Hopkinson v. Lee*, by articles of agreement under seal, between the defendant, of the one part, and the plaintiff, and A. C. Hogg, of the other part, after reciting that the defendant, as solicitor of one D. E., had applied to the plaintiff to lend to D. E. a sum of £2900 out of certain monies of the said A. C. Hogg, then in the plaintiff's hands in trust for A. C. Hogg, on the security of certain stock in the funds, and the covenant thereafter contained, the defendant, in pursuance of the agreement, and in consideration of the premises, and of the plaintiff having advanced the sum of £2900 to the said D. E., at the request of the said defendant, did covenant with and to the plaintiff, his executors, &c., and also, as a separate and distinct covenant, with and to the said A. C. Hogg, her executors, &c., that he, the defendant, would pay the plaintiff, his executors, &c., the regular interest on the £2900. It was held that the plaintiff could not maintain an action on this covenant without joining A. C. Hogg. There cannot be a stronger case than that, for there the defendant covenanted as a separate and distinct covenant with Hogg, and if a separate action could

1845.
BRADBURN
v.
BOTFIELD.

(a) 3 B. & C. 353. (b) 14 Law J., (N. S.) Q. B., 101. (c) 1 East, 497.

1845.
BRADBURN
v.
BOTFIELD.

have been maintained, it would have been in such a case. The plaintiff cannot deny that this is a joint covenant, in respect of which all the covenantees might sue, but he says, that because there are four tenants in common amongst them, the moment one assigns his interest, it becomes a joint and several covenant, so that the assignee may sue separately. According to that, the assignees of each of the four who had an interest are to have a remedy by action, in which they will recover damages for the whole breach of covenant, and it would be impossible for the other four to maintain any action at all. But covenants do not become joint or several by matter *ex post facto*: they must be either the one or the other at the time of the execution of the deed. [*Parke, B.*—I think the right to sue cannot be altered by the circumstance of one of the covenantees assigning his interest. The question is reduced to this, whether there is any several interest, which compels us to construe the covenant to be several. That will depend upon the lease, which we will take time to look through, as well as into the authorities which have been cited.]

Unthank replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case, a lease had been made of certain coal and iron mines to the defendant and others. By the indenture of demise, Sir E. Winnington and J. A. Adenbrooke, who appeared by the recital to be seised in fee of an undivided fourth part of the demised property, in trust for Mrs. Foley; Edward and E. M. Foley; Mary Whitby, who was seised in fee of another undivided fourth part; W. Townsend, who was seised in fee of one half; and George Townsend and Sarah Townsend, who had equitable interests in that half, all joined in demising, according to their seve-

ral and respective existing estates, rights, and interests in the tenements, to the defendant and others, yielding and paying certain rents to Edward Foley, E. M. Foley, Sir E. Winnington, J. A. Addenbrooke, Mary Whitby, S. Townsend, G. Townsend, and W. Townsend, respectively, and to their respective heirs and assigns, according to their several and respective estates, rights, and interests in the premises; and the defendant and others did thereby covenant to and with E. Foley, E. M. Foley, &c., and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, in manner following. And the declaration proceeded to state covenants to repair the premises, the furnaces, and buildings, and to surrender in good repair to the lessors, their heirs and assigns respectively, at the end of the term, and to work the mines properly, &c.: it then deduces a title to William Townsend's moiety to the plaintiff, and alleges breaches.

There is a plea stating John A. Addenbrooke to be the survivor of all the covenantees, and a demurrer, which raises the question, whether the covenants declared upon are covenants with all the parties demising, or are or may be treated as several covenants with the legal owners of each undivided part.

On the argument of the demurrer, we expressed our opinion that upon the face of the declaration the covenants were such as all the covenantees must have jointly sued upon, for the name of no one covenantor could be rejected. There must be some covenant on which all could sue, and all stated in the declaration were of the same character. If they related to the separate legal interest of each tenant in common, still the other covenantees must join, on the principle of the case of *Anderson v. Martindale* (a). But it was suggested that the lease ought to

1845.
BRADBURN
v.
BOTFIELD.

(a) 1 East, 497.

1845.
 BRADBURN
 v.
 BOTFIELD.

have been set out on oyer, and if it had been, that it would have appeared that there were other covenants, covenants in gross, in which all must join, and then the covenants running with the land, those declared upon, might be construed to be several covenants with each legal tenant in common; and the case stood over that we might be furnished with a copy of the lease. On this being done, Mr. *Unthank* cited several authorities, which he contended established the proposition, that the covenants declared upon might be treated as several covenants, and the Court took time to look into those authorities.

There is no occasion to refer to the cases relating to the rule of construction as to covenants being joint or several according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie v. Park* (a), Lord *Abinger* and myself, on referring to the established rule, as laid down by Lord Chief Justice *Gibbs* in the case of *James v. Emery* (b), approved of Mr. Preston's qualification and explanation of it in his edition of the *Touchstone*, 166, namely, that, if the language of the covenant *was capable of being so construed*, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir *Vicary Gibbs*, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by *any intention, however express*; and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this, because the Court of Queen's Bench, in the case of *Hopkinson v. Lee* (c), have supposed, that Lord *Abinger* and

(a) 12 M. & W. 146.

(b) 2 Moore, 195.

(c) 14 Law J. N. S. (Q. B.) 104.

myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale*, and *Slingsby's case*, which it was far from my intention, and I have no doubt from Lord *Abinger's*, to do; it being fully established, I conceive, by those cases, that one and the *same* covenant cannot be made both joint and several with the covenantees. It may be fit to observe, that a part of Mr. Preston's explanation, that, by express words, a covenant may be joint *and* several with the covenantors or *covenantees*, notwithstanding the interests are several, is inaccurately expressed: it is true only of covenantors, and the case cited from Salkeld, p. 398, relates to *them*; probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the *same* covenant might be made, by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench.

We have looked, since the argument, into the lease now set out on oyer, and into all the authorities cited for the plaintiff, and are still of opinion that he cannot recover upon the covenants stated in the declaration.

It is impossible to strike out the name of any covenantee, and all the covenantees *must* therefore necessarily sue upon *some* covenant; and there appear to us to be no covenants in the lease which are of a joint nature, if those declared upon are not, or which would be in gross, if the persons entitled to the legal estate had alone demised; for all relate to and affect the quality of the subject of the demise, or the mode of enjoying it, and could have been sued upon by the assignee of the reversion on such a lease, before breach. The covenant relied upon as being in gross, viz. that the lessors should be at liberty to use the ropes, &c. to descend into the mines, is a special covenant, relating to

1845.
BRADBURN
v.
BOTFIELD.

1845.
BRADBURN
v.
BOTFIELD.

the entry to view, and would, we think, go to the assignee of the reversion on such lease. If all the covenantees could not sue on the covenants declared upon, they could sue upon none. All, therefore, in their lives, and after the death of any, the survivors, are the proper plaintiffs. It becomes, therefore, unnecessary to decide whether one of several tenants in common, lessors, could sue on a covenant with all to repair, as to which there is no decisive authority either way. That *all could* sue is perfectly clear: *Kitchen v. Buckley* (a).

Our judgment must be for the defendant.

Judgment for the defendant.

(a) Sir T. Raym. 80; 1 Keb. 565; 1 Sid. 157; 1 Lev. 109.

June 28.

RUSSELL v. LEDSAM and Others.

Original letters patent, for a term of four-

CASE for the infringement of a patent.—The declaration recited Cornelius Whitehouse's patent, dated the 26th of February, 1825, and renewed letters patent were dated on the 26th of February, 1839:—*Held*, that the day of the date must be reckoned inclusively, and that the former term expired on the 25th of February, 1839, and consequently the renewed letters patent was granted after the original letters patent had expired.

Renewed letters patent, granted under 5 & 6 Will. 4, c. 83, s. 4, are not void if dated after the expiration of the term for which the original letters patent were granted, but may be granted by the Crown after the expiration of that term, provided the preliminary steps which the fourth section of the act requires to be taken by the patentee were complied with before that term ended.

But compliance with that condition, it being introduced in the fourth section in the form of a proviso, need not be averred by the plaintiff in his declaration, but non-compliance with it should be pleaded by the defendant.

Parties, however, who use the invention in the interval are not responsible.

Renewed letters patent were granted to the plaintiff "upon his securing to C. W. (the original inventor) an annuity of £500, so long as the letters patent should last:—" *Held*, that the meaning of this condition was, that a security should be given to C. W. for the annuity, but that whether it was given before or after the letters patent was immaterial; and that an agreement, that the annuity was at the date of the new letters patent secured, was supported by proof of a deed to secure the annuity, executed before the new letters patent were granted.

The power of renewal is not confined to *grantees*, but extends to *assignees*, of letters patent; and such renewed letters patent, granted to the assignee, are good by the stat. 5 & 6 Will. 4, c. 83, independently of the 7 & 8 Vict. c. 69.

February, 1825, for "certain improvements in manufacturing tubes for gas and other purposes," for the term of fourteen years from the date thereof; it then stated an assignment of the patent, dated the 9th of April, 1825, from Whitehouse to the plaintiff; and alleged that Whitehouse duly enrolled his specification (a) within the space of six months next after the date of the letters patent. It then alleged, that, after the passing of the stat. 5 & 6 Will. 4, c. 83, and before the committing of the grievances, &c., and during the said term of fourteen years, viz. in October, 1838, the plaintiff, being such assignee of the said letters patent, did advertise in the London Gazette, &c., (in the mode required by stat. 5 & 6 Will. 4, c. 83, s. 4, setting out the number of times, newspapers, &c.); that he the plaintiff intended to apply to her Majesty in council for a prolongation of his said term of the sale, vending, and using of the said invention; and that he did, within the said term of fourteen years, petition her Majesty in council for a prolongation of his said term, and that her Majesty referred the consideration of the petition to the Judicial Committee of the Privy Council, and that the Judicial Committee reported that a further extension of the term in the said letters patent, not exceeding seven years, to wit, for six years, should be granted. It then alleged, that hereupon, and before the committing of the grievances, &c., to wit, *on the 26th day of February, A.D. 1839*, by letters patent under the Great Seal of the united kingdom of Great Britain and Ireland, the date whereof is the day and year last aforesaid, reciting the letters patent of the 9th of February, 1825, and that the plaintiff had represented to her Majesty that the interest in the said invention and patent was afterwards purchased by him for a pecuniary consideration, and that assignments of all benefit arising therefrom were executed to him by the said C.

1845.

RUSSELL
v.
LEDGAM.

(a) This specification is set out at length in *Russell v. Cowley*, 1 C., 10, & R. 865—868.

1845.
RUSSELL
v.
LEDGAM.

Whitehouse, and that he had prayed her Majesty to grant him new letters patent for a term of seven years after the expiration of the term of fourteen years: And also reciting that the Judicial Committee had, in pursuance of the statute, reported to her Majesty that a further extension of the term in the said letters patent, not exceeding six years from and after the expiration of the term in the original letters patent, should be granted to the plaintiff, in whom the legal interest in the letters patent was then vested, upon his securing to the said C. Whitehouse, the original inventor, an annuity of £500 sterling per annum, so long as the said extension of the said letters patent should last: her Majesty did thereby grant to the plaintiff her royal license to use, exercise, and vend the said invention, for and during the term of six years, to be computed from the 26th day of February, 1839, being the day of the expiration of the first term of fourteen years granted by the said letters patent therein mentioned, upon his (the said plaintiff's) securing to the said C. Whitehouse, the original inventor, the said annuity of £500 sterling, so long as the said letters patent should last; with a proviso that, if the plaintiff should not secure to Whitehouse the annuity of £500, so long as the letters patent should last, then, upon signification or declaration thereof to be made by her Majesty, her heirs or successors, &c., the said letters patent should forthwith cease and determine. The declaration then averred, that, from the making of the said letters patent thence hitherto, the said annuity of £500 had been duly secured to Whitehouse, according to the true intent and meaning of the said new letters patent, and of the proviso therein contained. The declaration then alleged a breach in the usual terms.

Pleas, first, not guilty; secondly, that Whitehouse was not the first and true inventor of the said alleged invention and improvements; thirdly, that the said invention was not new; fourthly, that the said invention and improvements were not of any benefit or advantage to the public;

fifthly, a special plea setting out Whitehouse's specification verbatim, and then alleging that it was obscure, uncertain, contradictory, unintelligible, and insufficient, and by reason thereof the letters patent were wholly void; sixthly, that the specification did not particularly describe and ascertain the nature of the invention, and in what manner the same was to be performed as the plaintiff had alleged; seventhly, that the letters patent in the declaration secondly stated were granted after the expiration of the said term of fourteen years granted by the said letters patent in the declaration first mentioned, and not before the expiration of the same term, in manner and form as in the declaration is supposed; eighthly, that the report of the Judicial Committee, and the letters patent granted thereupon, were procured by fraud, covin, and misrepresentation; ninthly, that the said annuity of £500 had not been duly secured to the said C. Whitehouse, from the making of the letters patent secondly mentioned, according to the intent and meaning of the same letters, and of the proviso in that behalf therein contained, modo et formâ; tenthly, that Whitehouse did not assign the first-mentioned letters patent to the plaintiff, modo et formâ; and, lastly, that the defendants committed the said several grievances by the leave and license of the plaintiff.

The replications took issue on the first, second, sixth, seventh, ninth, and tenth pleas: to the third, the plaintiff replied, that the invention was new; to the fourth, that the invention and improvements were of benefit to the public; to the fifth, that the specification was not obscure, &c.; to the eighth, that the report and the letters patent were not obtained by fraud, &c.; and to the last plea, de injuriâ.—The rejoinders took issue upon these replications.

The cause was tried before *Alderson*, B., in part at the Middlesex Sittings after Michaelmas Term, 1843, and was concluded at the sittings after Trinity Term, 1844, when the jury found a verdict for the plaintiff, leave being reserved

1845.
 RUSSELL
 v.
 LEDSAM.

1845.
RUSSELL
v.
LEDSAM.

to the defendants to move to enter a verdict for them on the issues raised by the seventh and ninth pleas. In Michaelmas Term, 1844, a rule nisi was obtained for a new trial, on the ground that the verdict on the issues raised as to the novelty of the invention, and its infringement by the defendants, was against the evidence; also to enter a verdict for the defendants on the issues raised by the seventh and ninth pleas; and also why the judgment should not be arrested, on the ground of the insufficiency of the declaration. The plaintiff likewise obtained leave to move for judgment non obstante veredicto on the seventh plea, in case the Court should be of opinion that the verdict ought to be entered for the defendant on that plea.

Against the above rule cause was shewn, in Trinity Term last (May 31st and June 3rd), by

Jervis, Montague Smith, and Webster; and

Kelly, Watson, Rotch, and J. Henderson, were heard in support of the rule; but the arguments are so fully stated in the judgment of the Court, that it has been thought unnecessary to report them at length.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—Several questions of importance arose and were discussed in this case, which was argued during the last term.

It was an action for the infringement of a patent, in which the plaintiff had a verdict, subject to a question reserved by my Brother *Alderson* on the seventh and ninth pleas.

A motion for a new trial was also made, on the ground that the verdict was against evidence, on the issues on the novelty and on the infringement of the patent.

These two questions are of much importance, and were very fully and ably discussed. We have considered them, and are of opinion that the invention was new, and we have also come to the conclusion that the defendant has been guilty of an infringement.

In order to decide whether the invention was new, it is first necessary to define what the nature of the invention was.

In the case of *Russell v. Cowley*, this Court had already decided that the principle of the invention was the welding of iron pipes, in a state of welding heat, without a maundrell or internal support, and with circumferential pressure; and that the absence of a maundrell was sufficient to distinguish the plaintiff's patent from James and Jones's (a), in which a maundrell was used, whether the welding of the skelp or incomplete pipe was performed by hammers, or by a pair of grooved rollers, both modes being made use of under that patent. On the trial of this cause, however, a patent granted in 1824 to Mr. James Russell was given in evidence by the defendant. This patent was for welding iron pipes in a similar state of heat, placed in a semi-cylindrical recess in an anvil, by means of a tilt-hammer with a similar recess, and by a succession of blows the edges were beaten together with or without a maundrell. After this process, the pipe was passed through rollers, and met a cone-shaped maundrell, over which the inside of the tube passed, and the inside was thereby rendered smooth and the outside was finished. This patent, it was contended, was for circumferential pressure and without a maundrell, and therefore was the same in principle as the plaintiff's, and consequently the latter could not be supported. It appears to us, however, that the principle of the two inventions is not the same, for James Russell's does not

1845.
RUSSELL
v.
LEDSAM.

(a) This specification is set out in *Russell v. Cowley*, 1 C., M., & R. 868—871.

1845.
 RUSSELL
 v.
 LEDSAM.

operate by continuous equal circumferential pressure, as the plaintiff's does, but by the repetition of violent contact of short duration; the impact by hollow grooves striking on each other does not become equal continuous circumferential pressure, until the close of the operation. It does not cause an equal continuous circumferential pressure throughout the whole operation, and in effect, as we well observed by the learned counsel for the plaintiff James Russell's invention ends where the plaintiff's begins.

We think, therefore, that the jury have not come to a wrong conclusion on the question of the novelty of the invention.

But then it is said, that, in order to carry the plaintiff's invention into effect, the drawing the pipe through a fixed hole, and that of a conical or bell-mouthed form, is necessary; that it is an essential part of the plaintiff's patent; and that the defendant has not infringed it, for his apparatus does not move the pipe through a fixed hole; there is no relative motion between the pipe and the roller; and it does not draw out or stretch the pipe. It is on this part of the case that some of us have entertained more doubt than on the other; but, after much consideration, we do not see reason to differ in opinion with the jury, and think that the defendant's mode, though it is an improvement in some respects on the plaintiff's patent, is in others the same, and is an infringement of it.

In order to carry Whitehouse's invention into effect, it is clear that the pipe must be moved through a fixed hole; it is not to remain stationary, or the operation of continuous circumferential pressure on the whole tube could not be performed. In the specification, the mode of accomplishing this is by instruments which draw; but the invention, it is expressly stated, is not confined to the employment of the precise apparatus described, but the principle is said to be to heat the tubes of iron, to pass them in a state of welding heat through dies or holes, and

so unite the edges together; in order to effect which, the dies or holes are of a bell-mouthed shape, and thereby the joint becomes firmly welded. And this principle the defendant seems to us to have infringed. In his mode of operating, the skelp or unfinished pipe is received into an irregular conical or bell-shaped space, (not that in the guard, but one formed by the rollers), and passes along with the surface of the rollers to a hole formed by them at the point where their circumferences are in contact, and this hole is of fixed or definite size, and always in the same place, though its sides are moving, and are continually formed of a different material. Through this bell-shaped hole the pipe is passed, and the same sort of pressure in the orifice of the bell-mouth, and the same sort of pinch at the narrowest part, take place as in the plaintiff's bell-mouthed hole. In this respect it is the same as the plaintiff's patent—there is continual equal or circumferential pressure, without a maundrell; but in other respects, no doubt, there is a difference, and, on the whole, perhaps an improvement. There may not be the same injury to the fibre of the iron as by the drawing process, which weakens and attenuates the tube, and the method of operating is more convenient than that by which the plaintiff carries his principle into effect. But if the process is, as we think it is, in a material part the same, the defendant has been guilty of an infringement. There ought, we therefore think, to be no new trial.

The next question arises on a point reserved at the trial, on the evidence in support of the seventh plea. That plea was, that the second or renewed letters patent were granted after the expiration of the term of fourteen years granted by the first letters patent; the replication took issue on that allegation; and the proof was, that the original letters patent were dated on the 26th February, 1825, the second on the 26th February, 1839; and the question is, whether the day of the date of the first letters patent was inclusive

1845.
 RUSSELL
 &
 LINDSAY.

1845.
 {
 RUSSELL
 v.
 LEDHAM.

or exclusive. The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date: and many other instances are collected in the cases of *Webb v. Fairmaner* (a) and *Young v. Higgon* (b). But in this case the question is when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date. It was asked by Mr. *Kelly*, whether, if there had been an imitation of the invention on the day the patent was dated, it would have been an infringement of it; and we have no doubt that the answer ought to be, that it would; and if so, the day of the date would be included, and the patent would expire at midnight on the 25th February, 1839, for the law never takes notice of the fraction of a day, except where there are conflicting rights between subjects. We are therefore of opinion, that the verdict on the issue on the seventh plea must be entered for the defendant, pursuant to the leave reserved.

The plaintiff then avails himself of the liberty given to move for judgment non obstante veredicto on this plea; on the ground that, under the 5 & 6 Will. 4, c. 83, s. 4 (c),

(a) 3 M. & W. 473.

(b) 6 M. & W. 49.

(c) Which enacts that, "if any person who now hath or shall hereafter obtain any letters patent *as aforesaid*, shall advertise in the London Gazette three times, and in three London papers, and three times in some country paper published in the town where or near to which he carries on any manufacture of anything made accord-

ing to his specification, or near to or in which he resides, in case he carries on no such manufacture, or published in the county where he carries on such manufacture, or where he lives, in case there shall not be any paper published in such town, that he intends to apply to his Majesty in Council for a prolongation of his term of sale, using, and vending his invention, and shall petition his Majesty in Coun-

renewed letters patent are not void, if dated after the expiration of the former term. And this question depends on the construction of that section, which admits of some doubt.

The use of the terms "prolongation" and "extension" would seem to indicate one continuous term, without an interval. On the other hand, the remainder of the clause appears not to require it. It enacts, that the Judicial Committee may, on petition, consider and report that an extension should take place, and the King may grant new letters patent, for a term not exceeding seven years after the expiration of the first term; and then follows a proviso, "that no such extension shall be granted (that is, by the Crown) if the application by petition shall not be made and prosecuted with effect before the expiration of the term." The "prosecuting with effect," which is to warrant the Crown to grant, means, according to the ordinary construction of the sentence, a prosecuting with effect prior to and independent of that grant, and not the grant itself;—and that must be, the obtaining the report of the Judicial Committee, or the approbation of it by the Crown; and if

1845.
 }
 RUSSELL
 v.
 LEDSAM.

cil to that effect, it shall be lawful for any person to enter a caveat at the council office; and if his Majesty shall refer the consideration of such petition to the Judicial Committee of the Privy Council, and notice shall first be by him given to any person or persons who shall have entered such caveats, the petitioner shall be heard by his counsel and witnesses to prove his case, and the persons entering caveats shall likewise be heard by their counsel and witnesses; whereupon, and upon hearing and inquiring of the whole matter, the Judicial Committee may report to his Majesty that a further extension

of the term in the said letters patent should be granted, not exceeding seven years; and his Majesty is hereby authorized and empowered, if he shall think fit, to grant new letters patent for the said invention for a term not exceeding seven years after the expiration of the first term, any law, custom, or usage to the contrary in anywise notwithstanding; provided, that no such extension shall be granted, if the application by petition *shall not be made and prosecuted with effect before the expiration of the term* originally granted in such letters patent."

1845.
RUSSELL
v.
LEDGAM.

so, there is no necessity for the new letters patent to be actually issued, before the expiration of the old.

It is said, then, may the Crown grant at any interval after the end of the term, so that the new term does not exceed seven years from the end of the old one? And what will be the condition of persons who make use of the invention between the end of the old and the beginning of the new patent?

It seems to us that there is no limit except the discretion of the Crown, and it is to be presumed that the grant will not be made after a long interval, at least without protecting those who have invested their capital in order to use the invention; and such, if any, who have done so before the expiration of the first patent, have always an opportunity of being heard in the Judicial Committee against the petition for an extension.

With respect to those persons who use it in the interval, there is no doubt they are not responsible.

The conclusion to which we have come is, that the legislature did not intend to restrict the Crown as to the actual date of the grant, if all the preliminaries were completed before the expiration of the term; and therefore it appears to us that the seventh plea is bad. The defendant, in order to have availed himself of the proviso, should have pleaded that the petition was not prosecuted with effect within the term of the first patent; and compliance with this condition, which is introduced in the form of a proviso, need not be averred by the plaintiff in his declaration, but the non-compliance should have been pleaded by the defendant.

The next question is, whether the issue raised by the traverse on the ninth plea ought to be found for the plaintiff; and we think it ought.

There is an allegation in the declaration, that her Majesty granted the new letters patent to the plaintiff "upon his securing to Cornelius Whitehouse, the original inven-

ter, an annuity of £500" so long as they should last; and the declaration contains an averment, that, *from the making* of the new letters patent hitherto, the annuity has been duly secured to Cornelius Whitehouse, according to the new letters patent.

It appeared on the trial, that, before the date of the new patent, viz. on the 1st June, 1836, the plaintiff and Whitehouse, by indenture, had covenanted that Whitehouse should petition for new letters patent, and should assign them to the plaintiff; that he should work in the manufacture of tubes for Russell and his partners, and serve them in their trade during the new term, and give them the benefit of all improvements that he might effect in the manufacture of tubes according to the invention; and the plaintiff did thereby covenant, during the new term, to pay £300 per annum, and to allow Whitehouse to live rent-free in a house of his, with a proviso to deduct a sum (not mentioned) for every day he might be absent, or not work. Afterwards, on the 17th December, 1838, by another indenture, reciting the petition of the plaintiff for an extension of the patent, and that the petition had been heard before the Judicial Committee, and that an extension of the patent was expected to be granted, the plaintiff covenants to pay £500 per annum instead of £300, and to exonerate him from the obligation of working for and serving the plaintiff during the new term, or otherwise, and stipulates that the £500 annuity shall not be subject to deduction.

The defendant contended, that this stipulation to secure the annuity of £500 was a condition precedent to the validity of the new patent, and that the averment in the declaration that it was secured was not proved, for two reasons: 1st, because the grant of that annuity was not exerted *after* the grant of the new letters patent, the condition requiring the *future* security; and 2ndly, because the new grant was not an absolute one, but was clogged with

1845.

RUSSELL
v.
LEDSAM.

1845.
RUSSELL
v.
LEDHAM.

a covenant, on the part of Whitehouse, contained in the deed of June, 1836, to give the benefit of future discoveries during the new term, and therefore was not to receive the annuity absolutely, which covenant was not released by the new deed, although the covenant to work and serve was.

We think that neither of these objections ought to prevail. As to the first, we think that the averment in the declaration, that the annuity *was* at the date of the new new letters patent *secured*, is clearly proved: and the objection ought to be in arrest of judgment, that the declaration was insufficient, as it did not aver a security given for the first time subsequently to the date of the new patent. In that shape, however, we think the objection equally unavailable, because the meaning of the condition is, that there should be a security to Whitehouse for the annuity, and whether given before or after the letters patent is immaterial.

With respect to the second objection, we think that the covenant in the indenture of June, 1836, to give the benefit of any improvement, is only incidental to the working for the plaintiff in the manufacturing of tubes during the term, and is part of the service therein stipulated to be performed, and, consequently, is released by the second indenture; so that, under the two indentures together, Whitehouse has the benefit of an absolute unconditional covenant to pay £500 a year: besides, the second indenture, at all events, contains such a covenant, and this appears to us sufficient, though a part of the covenant in the first continues obligatory on Whitehouse, especially as it must be taken upon the evidence that Whitehouse was satisfied with the security. The verdict, therefore, must stand for the plaintiff on the ninth issue.

The only remaining question is, whether the declaration is good on motion in arrest of judgment.

The defendant insists, that, under the stat. 5 & 6 Will. 4, c. 83, the new letters patent cannot be granted to the as-

signee of the original letters-patent. And the objection, if it be one, appears on the record.

This depends upon the construction of the 4th section of that act, which provides, that if any person *who now hath*, or shall hereafter obtain any letters-patent *as aforesaid*, shall advertise, &c., and petition, the Crown may grant an extension of the patent.

The words "as aforesaid" may mean *such* patent as aforesaid, and refer to the previous description of the patent *only*, such as "a patent for the sole making, &c. of a new invention;" or they may mean to refer to the description of the title of the person obtaining the patent, *as grantee, assignee, or otherwise*. On the former supposition, the plaintiff would be entitled, because he *has*, at the time of the act passing, the letters-patent. But it is urged, if this construction be adopted, the possessor, as assignee of a patent at the time of the act passing, could obtain an extension, and the possessor, as assignee of a future patent, could not, which, it is said, is unreasonable; and therefore it is urged that the words should be slightly altered, and the enactment read as if it had provided that any one who had then obtained, or thereafter should obtain, letters-patent, should be entitled to an extension; and this would be a proper construction, and necessary to make the enactment consistent, if the first supposition is adopted, and the words "as aforesaid" are construed as meaning a patent for a new invention only; but if we act on the second supposition, and hold that these words mean to bring down by reference the words "as grantee, assignee, or otherwise," and these words mean to include the assignee of the patent, there is no occasion for any alteration of the sentence—the inconsistency is obviated: the possessors, by assignment, of an existing and of a future patent are both on the same footing, and both entitled to petition for a prolongation of the term; and this is a good reason for

1845.

RUSSEL
v.
LEDGAY

1845.

RUSSELL
v.
LEDSAM.

adopting a construction making the whole reasonable, without any alteration of the language used.

The ordinary sense of the word "obtaining," which alone would probably be taken to mean the original obtaining from the Crown, is, we think, explained by the context to mean the becoming possessed of it either by original grant, by assignment, or by *any other title*. We feel a difficulty in adopting the explanation of these words, "as assignee," given by some of the Judges in the case of *Spilsbury v. Clough* (a), who suppose that they are meant to refer to an assignee of a foreign invention who obtains a patent here; for the assignee is distinguished from the *grantee*, and one who obtains letters-patent as assignee, as distinguished from grantee, must take by *assignment* the *letters-patent*, not the *invention*. Besides, the importer, who is not necessarily *the assignee* of a foreign invention, and very seldom is, may have letters-patent granted to him. The act is certainly penned so as to leave the construction open to doubt, but our opinion is, that the power of renewal is not confined to grantees, but extends to assignees, and the Legislature may reasonably be supposed to have intended to compensate the assignee as well as the patentee for labour bestowed and capital expended, without adequate remuneration, in bringing a useful invention to perfection, as they clearly have done by a subsequent statute.

It is no doubt true that the Legislature have by that statute, 7 & 8 Vict. c. 69, s. 4, expressly extended the benefit of having a renewed patent to an assignee, and expressly confirmed existing titles, with an exception which applies to the present case, (sect. 7); but this leaves the present case as it stood before, and, as this provision is not declaratory, it has no other effect than that of rais-

(a) 2 G. & D. 17; 2 Q. B. 466.

ing a surmise as to the opinion of the Legislature as to the construction of a clause. But the province of the Legislature is not to construe, but to enact; and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on Courts, whose duty is to expound the statutes they have enacted. A strong instance of this is found in the case of *Dore v. Gray* (a), which was referred to during the argument. This clause we consider to have been introduced for the sake of removing all doubt as to the title of an assignee to the renewed patent, leaving the question as to titles then in litigation exactly as it stood before.

Our opinion, therefore, is that the judgment ought not to be arrested, and that on the whole the plaintiff is entitled to succeed.

Rule accordingly.

(a) 2 T. R. 365.

1845.
RUSSELL
v.
LEDSAM.

PHILLIPPS v. SMITH.

July 9.

THIS was an action of assumpsit, brought by the plaintiff against the defendant, who had been his tenant from year to year of a farm in the county of Leicester, for managing and cultivating it contrary to the course of good husbandry, and in a bad and untenant-like manner. The defendant pleaded non assumpsit, and also that he managed and cultivated the farm in a good and tenant-like manner; on which issues were joined.

At the trial, before *Maule, J.*, at the last Leicester Assizes, the only acts proved against the defendant were, the cutting down, for the purpose of sale, of a number of pollard willow trees, of considerable size, which grew on the side of a brook, but were not shewn to be of any service

Lessee for years cutting down willows, and leaving the stools or butts, from which they will shoot afresh, is not waste, unless they are a shelter to the house, or a support to the bank of a stream against the water.

1845.
 PHILLIPPS
 v.
 SMITH.

as a support of the bank against the water, nor to be any protection to the farm-house; and also some trivial injuries to the fences. The willows were cut down close to the ground, leaving the *stools* or *butts*, from which fresh shoots grow again. It was contended for the defendant, that such cutting down of these trees was not a breach of the implied agreement to cultivate according to good husbandry and in a tenant-like manner: for the plaintiff it was answered, that it was so, inasmuch as this amounted to positive waste. The learned Judge reserved the point, and the jury having assessed the value of the willows cut down at £64, he gave the defendant leave to move to reduce the damages (which in the whole were 66*l.* 4*s.* 6*d.*) by that sum.

In Easter Term, *Humfrey* moved pursuant to the leave reserved, and having cited the Year Book, 12 Hen. 8. 1, b. (a), as an authority that the cutting down of these willow trees was not waste, obtained a rule nisi, against which, on a former day of the present sittings (June 19),

Whitehurst (with whom were *Hill* and *Willmore*) shewed cause.—The question here is not whether the cutting of these willows was *waste* or not, but whether it was managing the farm in a good and tenant-like manner. [*Park*, B.—No custom of the country is alleged; what, then, is untenant-like management but waste? There can be no obligation on the tenant, except to farm according to the custom of the country or special agreement—both of which are excluded here,—or according to the common law.] Then the plaintiff will contend that the cutting of these trees was destruction of the inheritance, and so waste at common law. The common law must be founded

(a) "Unē si le lesee doit reparer
 ē, donq ē seroit wast, cōe willows
 ne sont wast, si sont cressāts in
 ascū lieu; mes si sont in view d'un
 manoir p' defendr le vêt, ou sōt in
 un banc pur sustener le banc, dōq
 sōt wast."

on reason. Now, in flat and marshy districts, the only timber for the use of the farm, for house-bote, &c., may be willows, which are most valuable for that purpose; and can a tenant not merely take their toppings, but wholly destroy them, without being guilty of waste? [*Parke, B.*—It is laid down in Co. Litt. 53. a., that “waste properly is in *timber trees* (viz. oak, ash, and elm, and these be timber in all places), either by cutting of them down, or topping of them, or doing any act whereby the timber may decay. Also, in countries where timber is scant, and beeches or the like are converted to buildings for the habitation of man, or the like, they are all accounted timber:” and that “cutting down of *willows*, beech, birch, ash, maple, or the like, *standing in the defence and safeguard of the house*, is destruction.”] At common law, the tenant cannot use the *stocks* of trees except for the purposes of the farm; if he sells or otherwise uses them, it is waste. The authorities on this subject are collected in Vin. Abr., Waste, (E.) It is there said, “Of whitethorns waste may be made by *cutting down*,” citing 46 Edw. 3. 17, and 9 Hen. 6. 67. “If a termor cuts down *underwood* of hazel, willows, maple, or oak, *which is seasonable*, it is not waste: M. 11 Jac. b.” Again, “Waste may be committed by *cutting down* of certain pear-trees: 7 Hen. 6. 38. So it may be committed in cutting down certain apple-trees: 7 Hen. 6. 38.” In Bro. Abr., Waste, pl. 44, it is also said to have been agreed that cutting down whitethorns was waste. So, in Dyer, 35 b, n. 38, it is said, that eradicating or *unseasonably cutting* them is waste. So, in Cro. Jac. 126, pl. 15, “Stubbing up a whitethorn hedge, or felling timber, or any kind of trees standing for the safeguard of the house or cattle, is destruction.” It seems, therefore, from these authorities, that if the tenant destroys the tree so as to prevent the crop, that is waste as to other than timber trees. Lessee may cut a hedge, but may not grub it up: so he might lop or cut these trees, but he could not destroy

1845.
 PHILLIPPS
 v.
 SMITH.

1845.
 PHILLIPPS
 v.
 SMITH.

them to the bottom. The passage from the Year Book, 12 Hen. 8, mentioned on moving for this rule, was a mere obiter dictum of *Brudnel, J.*, and no authority is cited; and whether he refers to mere pruning, or cutting down altogether, does not appear. [*Rolfe, B.*—A hedge may stand on a different footing; because it is important in marking the boundaries of the land.] This was not a cutting as a crop, or for the use of the farm, but for sale, and amounted, according to the authorities, to waste at the common law.

Humfrey and Macaulay, contra.—This was not waste. Every exposition given in Co. Litt. 53. a., of what is waste, excludes this. When it is said that “cutting down of willows, &c., *standing in the defence and safeguard of the house*, is destruction,” that is *exclusio alterius*. Nor is there any authority which says that the mere *cutting down* of trees, not timber trees, is waste. Thus in Cro. Jac. 127, the case is thus:—“Note, it was held by all the Court, that *eradicating* of whitethorns is waste; but *succidendo* [i. e. *felling*] *et vendendo* is no waste, unless it be laid that they grew in pasture for defence of cattle, and were of the greatness of timber.” In Com. Dig., Biens, (H.), the rule of law is stated to be, that “lessee for life or years has only a special interest and property in the fruit and shade of timber-trees, so long as they are annexed to the land; and he has a general property in hedges, bushes, trees, &c., which are not timber; and therefore, if the lessee cuts down hedges or trees not timber, the lessee shall have them.” That rule is adopted by *Tindal, C. J.*, in *Berriman v. Peacock* (a), where he says, that, “according to the old authorities, the general property in trees [i. e. *timber trees*] is in the landlord, and the general property in bushes is in the tenant; although, if he exceeds his right,

(a) 9 Bingh. 384.

as by *grabbing up* or destroying fences, he may be liable to an action of waste." The tenant undoubtedly cannot *eradicate* a tree not timber, because that is necessarily a damage to the inheritance; but the cutting down of trees which spring again from the stools, like willows, is not so. [Rolfe, B.—In the case of a *fir tree*, I should say the cutting it down to the ground would be waste, because it will not grow again.

1845.
PHILLIPPS
v.
SMITH.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—The only point upon which the Court reserved its judgment in this case was, whether the cutting down of the willow trees, in respect of which the jury have assessed the damages at £64, amounted to waste at the common law. And, upon full consideration, we think it did not; and that the verdict found by the jury should be reduced to the sum of 2*l.* 4*s.* 6*d.*, according to the reservation of the learned Judge.

These willow trees were of considerable size, and were standing by the side of a brook, but were not serviceable either as a defence or support of the bank against the water, nor were they standing so as to be a protection to the house demised.

The principle upon which waste depends is well stated in the case of *Lord Darcy v. Askwith* (a), thus:—"It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he may not destroy the stock or breed of anything, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, or

(a) Hob. 234.

1845.
 PHILLIPPS
 v.
 SMITH.

the like." Thus, the destruction of germens, or young plants destined to become trees, Co. Litt. 43, which destroys the future timber, is waste; the cutting of apple-trees in a garden or orchard, or the cutting down a hedge of thorns, Co. Litt. 53. a., which changes the nature of the thing demised; or the eradicating or unseasonable cutting of white-thorns, Vin. Abr., Waste, (E.), which destroys the future growth, are all acts of waste. On the other hand, those acts are not waste which, as *Richardson, C. J.*, in *Barrett v. Barrett* (a), says, are not prejudicial to the inheritance, as, in that case, the cutting of willows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law or particular local custom. So, likewise, cutting even of oaks or ashes, where they are of seasonable wood, *i. e.* where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not waste. Now if we apply the principles to be extracted from all these authorities to the present case, we have no difficulty in saying that the cutting of these willows does not amount to waste. They are not timber trees, and when cut down they are not, so far as appears by the evidence, destroyed, but grow up again from their stumps, and produce again *their ordinary and usual* profit by such growth; therefore neither is the thing demised destroyed, nor is the thing demised changed as to the inheritance, for profit remains, as before, derivable from the reproduction of the wood from the stump of the willow cut down. Nor are the trees in such a situation as to make the cutting of them waste, by reason of what is called collateral respect; as where trees not timber are situated so as to be useful for protection of a house, Co. Litt. 53, and so become, as it were, a part of the house; as in *Hob. 219*, willows growing within the site of the house. Nor are they willows within view of the manor-house, which defend it from the wind,

(a) *Hetley*, 35.

or in a bank to sustain the bank, 12 H. 8. 1 ; or like white-thorns used for the like purpose, or where they stand in a field depastured, and are used for the shade of the beasts depasturing, and so are intended permanently to remain in that particular form, for the advantage of those to whom the inheritance may thereafter come.

We therefore think that the cutting of them by the defendant was not an act of waste at the common law; and as he is not liable, either by agreement or by the custom of the country, for having cut them, we think the verdict should be reduced, and the rule made absolute for that purpose.

Rule absolute.

1845.
PHILLIPPS
v.
SMITH.

MIDGLEY v. RICHARDSON.

July 9.

TRESPASS for breaking and entering a close of the plaintiff, in the chapelry of Medolmsley, in the parish of Lanchester, in the county of Durham, digging and making excavations therein, erecting an embankment and constructing a railway thereon, and building thereon an engine-house, and placing therein a steam-engine and working the same, &c. Second count, for breaking and entering two other closes of the plaintiff, situate as aforesaid, one of them being called the "Pontop and South Shields Rail-

An act of Parliament for inclosing the moors and commons within the manor of Lanchester, in the county of Durham, contained a saving of all the seignorial rights of the Bishop of Durham as lord of the manor, and also provided,

that the bishop and his successors, and their lessees and assigns, should at all times thereafter work and enjoy all mines and quarries lying under the said moors and commons, together with all convenient and necessary ways and way-leaves over the same, and full and free liberty of making and using any new roads or wagon ways over the same, and for that purpose to remove obstructions, &c., and of winning and working the said mines and quarries belonging to the see and bishopric of Durham, wheresoever the same should be, and of leading and carrying away all the coals, minerals, &c. to be gotten thereout, or out of any other lands and grounds whatsoever, &c. :—*Held*, that this clause entitled the bishop to carry over the lands inclosed under the act, not only coals and minerals got within or under those lands, but also those got out of any other mines belonging to the see of Durham ; but not to carry coals, &c. got out of other mines worked by the bishop, but not belonging to the see.

Held, also, that an allegation, that a certain colliery was within and parcel of the manor, was not a sufficient allegation that it was a colliery belonging to the see.

1845.
 MIDGLEY
 v.
 RICHARDSON.

way," and with the wheels of steam-engines, carts, wagons, &c., subverting and damaging the soil thereof, &c.

Plea, that the said several closes of the plaintiff, in which &c., in the declaration mentioned, were and are part and parcel of the moors and commons within and parcel of the parish and manor of Lanchester, in the county palatine of Durham, mentioned in a certain act of Parliament made and passed in the reign of his late Majesty King George the Third, intituled "An Act for dividing and inclosing certain manors, commons, and tracts of waste land within the parish and manor of Lanchester, in the county palatine of Durham," and by the said act of Parliament directed to be divided, set out, and allotted, as in the said act is mentioned. And the defendant further says, that, before and at the making and passing of the said act, the Lord Bishop of Durham for the time being had been and was, in right of his church and see of Durham, lord of the manor of Lanchester aforesaid, and as such lord of the said manor, before and at the making and passing of the said act, was seised as of fee of and in the said moors and commons, and of and in the mines, minerals, and quarries lying and being within or under the said moors and commons. And the defendant further says, that after the making and passing of the said act, and after the said moors and commons had been divided, allotted, and inclosed in pursuance and by virtue of the said act, and also before and at the said several times when &c., in the declaration mentioned, the said Right Rev. Father in God, Edward Lord Bishop of Durham, in right of his church and see of Durham, was and still is lord of the manor of Lanchester aforesaid, and, as such lord of the said manor, at the said several times when &c., was and still is seised as of fee of and in the said mines, minerals, and quarries lying and being within or under the said moors or commons. And the defendant further says, that, before and at the making and passing of the said act, the Lord Bishop

of Durham for the time then being such lord of the said manor, and seised as aforesaid, was entitled, for himself, his lessee and lessees, and assigns, and the said Father in God, Edward Lord Bishop of Durham, before and at the said several times when &c., then being such lord of the said manor, and seised as aforesaid, was, under and by virtue of the said act of Parliament, lawfully entitled, for himself, and his lessee and lessees, and assigns, from time to time and at all times, to have, hold, work, and enjoy all the said mines, minerals, and quarries, of what nature or kind soever, being within or under the said moors and commons, together with all convenient and necessary ways and way-leaves in, through, over, and along the said moors and commons, or any part thereof, and full and free liberty, at all times, of making, laying, repairing, and using any new road or roads, wagon-way or wagon-ways, or any other way or ways whatsoever, in, through, over, and along the same, or any part thereof; and for that purpose to take away and remove any hedges, fences, trees, partitions, or other obstructions made for dividing the said moors or commons, or otherwise, or which should be standing or growing thereon; and to do every other act which should be necessary to be done for the purpose aforesaid, and of searching for, draining, mining, and working the said mines and quarries, and also all other mines and quarries belonging to the said see and bishopric of Durham, wheresoever the same were or might be, by any ways or means then in use, or thereafter to be invented; and also of leading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other lands or grounds whatsoever; and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of making pits, shafts, pit-rooms,

1845.
MIDGLEY
v.
RICHARDSON.

1845.
MIDDLEY
v.
RICHARDSON.

heap-rooms, drifts, levels, watercourses, and drains, and of erecting and using fire-engines and other engines, and other buildings, workshops, hay-yards and raff-yards, pit-rooms, heap-rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities, either then in use or thereafter to be invented, and that without paying any damages or making any satisfaction for so doing. And the defendant further says, that, after the making and passing of the said act of Parliament, and before and at the said several times when &c., he the defendant, as the servant and by the license and command of the said Edward Lord Bishop of Durham, was about to carry and convey large quantities of coals and minerals from certain lands and grounds called "The Derwent Colliery," situate, lying, and being within and parcel of the said manor, to a certain railway called the "Pontop and South Shields Railway," and along the last-mentioned railway to a certain port or place at South Shields, the said coals and minerals being coals and minerals then gotten out of the said lands and grounds called the Derwent Colliery, and within the aforesaid manor; and thereupon, for the so carrying and conveying the said coals and minerals from the said lands and grounds called the Derwent Colliery to the said Pontop and South Shields Railway as aforesaid, it became and was convenient and necessary to construct a railway across the said closes in which &c., of the plaintiff, and also to construct upon the said closes in which &c. a certain engine-house, with a steam-engine placed therein for the drawing and impelling wains, carts, wagons, and carriages upon and along the said railway: whereupon, for the so carrying and conveying the said coals and minerals from the said lands and grounds called the Derwent Colliery to the said Pontop and South Shields Railway as aforesaid, he the defendant, as the servant of the said Edward Lord Bishop of Durham, and by his license and command, did, at the said times

when &c., in the declaration mentioned, construct a railway across the said closes in which &c., of the plaintiff; and also did at those times construct an engine-house, and place a fixed steam-engine therein for the drawing and impelling wains, carts, wagons, and carriages upon and along the said railway: and he the defendant, as the servant of the said Edward Lord Bishop of Durham, and by his command, did, at the same time when &c., carry and convey the said coals and minerals in certain wains, carts, wagons, and carriages, from the said lands and grounds called the Derwent Colliery, upon and along the said railway to the said Pontop and South Shields Railway; and, for the drawing and impelling the said wains, carts, waggons, and carriages loaded with the said coals and minerals as aforesaid upon and along the said railway constructed by the defendant as aforesaid, he the defendant, as the servant of the said Edward Lord Bishop of Durham, and by his license and command, then used the said fixed steam-engine, and also certain locomotive steam-engines, the aforesaid construction of the said railway and engine-house, and the aforesaid construction and placing the said fixed steam-engine therein, and the said use of the said locomotive steam-engines, wains, carts, wagons, and carriages, then and there being reasonable, convenient, necessary, and proper modes and means of and for the said carrying and conveying the said coals and minerals from the said lands and grounds called the Derwent Colliery to the said Pontop and South Shields Railway; and in so constructing the said railway and engine-house, and constructing and placing therein the said fixed steam-engine, and carrying and conveying the said coals and minerals in the said wains, carts, wagons, and other carriages, as in this plea aforesaid, he the defendant, as the servant of the said Edward Lord Bishop of Durham, and by his license and command, unavoidably committed the said several trespasses in the declaration mentioned in the said several

1845.
MIDGLEY
v.
RICHARDSON.

1845.
 MIDGLEY
 v.
 RICHARDSON.

closes of the plaintiff in which &c., as the defendant lawfully might for the cause in this plea alleged, the defendant, on the occasion in this plea mentioned, doing no unnecessary damage to the plaintiff or his said closes in which &c.—Verification.

General demurrer, and joinder in demurrer.

The points stated in the margin were as follows:—

“One of the matters of the law intended to be argued on this demurrer is, that the plea does not shew that the coals and minerals gotten out of the lands and grounds called the Derwent Colliery were coals or minerals lying within or under the moors or commons within the parish and manor of Lanchester, or were won or worked from any mines or quarries belonging to the bishopric of Durham.

“The defendant will contend, on the argument of this demurrer, that, by the inclosure act mentioned in the said plea, the ancient rights of the see of Durham are preserved to the bishop, and that the way-leaves and rights of carrying coals, &c., reserved or given by the act to the bishop, are not restricted to coals, &c. belonging to the bishop, or worked under the moors and commons to be inclosed, or under lands of the see, but confer on the bishop the right of carrying and of authorizing the carrying over the inclosed lands coals, &c. wherever gotten, more especially coals, &c. gotten within the manor of Lanchester.”

The case was argued at the sittings in banc after last Easter Term (May 18), by *Watson* for the plaintiff, and *Unthank* for the defendant. *The Durham and Sunderland Railway Company v. Walker* (a) and *Greathead v. Morley* (b) were cited, and the former case was strongly relied on for the plaintiff. The facts and arguments sufficiently appear from the judgment, which was now delivered by

(a) 2 Q. B. 940; 2 G. & D.
 326.

(b) 3 Man. & G. 139; 3 Scott,
 N. R., 638.

ROLFE, B.—The question in this case arose on a demurrer to a plea. The action was an action of trespass *qu. cl. freg.*, for entering on the land of the plaintiff, and there making a railway and erecting an engine-house. The defendant justified as the servant and by license of the Bishop of Durham. The plea states, that the land of the plaintiff on which the trespass was committed is part of the lands constituting the moors and commons of the manor of Lanchester, in the county of Durham, which were inclosed in the year 1773, under an act of Parliament passed in that year. The plea then avers, that the Bishop of Durham is seised in fee of that manor, and that the present bishop, being so seised, was, at the time of the trespasses, entitled, by virtue of the said act, for himself, his lessees and assigns, to work all mines and quarries under the said moors, with all convenient ways and way-leaves over the same, and for that purpose to remove hedges and obstructions; and that he had also the right of conveying over the lands all coal and minerals gotten out of any mines belonging to the see of Durham, or out of any other lands or grounds whatever, and the right of erecting thereon engine-houses and other necessary works and buildings. The plea then states, that the defendant, as the servant and by the command of the bishop, was about to convey large quantities of coal from certain lands called the Derwent Colliery, situate within and being parcel of the said manor, to South Shields, being coals gotten from the said colliery; and that, for the conveying thereof, it became necessary to construct the railway and make the engine-house in question over and upon the said lands of the plaintiff; and that the defendant accordingly did make such railway and erect such engine-house, as the servant and by the command of the bishop.

To this plea there is a general demurrer; and the question is, whether the plea sufficiently shews a right in the bishop to authorize the trespass complained of; *i. e.* to au-

1845.
MIDDLEY
v.
RICHARDSON.

1845.
 MIDGLEY
 v.
 RICHARDSON.

thorize the making of a railway over the inclosed lands, formerly moors, for the purpose of conveying along it coal gotten from a mine averred to be within and parcel of the manor of Lanchester, but not otherwise appearing to belong to the see of Durham.

The nature and extent of the bishop's right over the inclosed lands, formerly moors, must be ascertained from the inclosure act, and it is to be collected mainly from the clause at page 43 of the printed copy, handed up to us at the time of the argument. That clause begins by saving to the bishop, in the most ample terms, all seignoral and other rights in and over the moors and commons to be inclosed, and then proceeds as follows:—[His Lordship read the clause (a).] It must be admitted, that there is

(a) The following are the clauses of the act referred to in the judgment:—

(P. 43). "And be it further enacted, that nothing in this act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Lord Bishop of Durham, as lord of the said manor of Lanchester, or his successors, or his or their lessees or assigns, or any of them, of, in, or to the seigniority and royalties incident and belonging to the said manor, but that the lord of the said manor for the time being, and his lessee and lessees and assigns, shall and may, from time to time and at all times for ever hereafter, hold and enjoy all courts, perquisites and profits of courts, rents, services, waives, estrays, and all royalties, jurisdictions, matters, and things whatsoever to the said manor, or to the lord thereof for the time being, incident, belonging, or appertaining, other than

and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner, to all intents and purposes, as he or they could or might have held or enjoyed the same if this act had not been made; and also, that the said Lord Bishop of Durham, and his successors, and his and their lessee or lessees and assigns, shall and may, from time to time and at all times hereafter, have, hold, work, and enjoy all mines, minerals, and quarries, of what nature or kind soever, lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways and way-leaves in, through, over, and along the said moors and commons, or any part thereof, not only before, but also at all times after the same shall be divided in pursuance and by virtue

some difficulty in satisfactorily extracting from this mass of words the precise meaning of the Legislature, as to the ex-

1845.
MIDOLEY
v.
RICHARDSON.

of this act, and full and free liberty, at all times hereafter, of making, laying, repairing, and using any new road or roads, wagon-way or wagon-ways, or any other way or ways whatsoever in, through, over and along the same, or any part thereof, and for that purpose to take away and remove any hedges, fences, trees, plantations, or other obstructions which shall be made for dividing the said moors or commons, or otherwise, or which shall be standing or growing thereon, for the purposes aforesaid; and of searching for, draining, winning, and working the said mines and quarries belonging to the see and bishopric of Durham, wheresoever the same are or be, by any way or means now in use, or hereafter to be invented; and also of leading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other lands or grounds whatsoever; and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries, needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of the making pits, shafts, pit-rooms, heap-rooms, drifts, levels, watercourses, and drains, and of using as heretofore all those buildings, workshops for smiths and wrights, hay-yards, or raff-yards already erected, for the purpose of working the coal-mines under the

said moors or commons, and of erecting and using fire-engines and other engines, and other buildings, workshops, hay-yards and raff-yards, pit-rooms, heap-rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities, either now in use or hereafter to be invented; together also with full and free liberty, power, and authority, from time to time and at all times, at his and their will and pleasure, to remove and take away from off the said moors or commons, and convert to their own use and uses, all and every the rails, sleepers, iron, timber, and other materials of the said wagon-ways and other ways, pits, shafts, fire-engines, and other engines, shops, and other works, buildings, and erections whatsoever, already laid, placed, built, or erected, or hereafter to be laid, placed, built, or erected as aforesaid, as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this act had not been made, and that without paying any damages or making satisfaction for so doing."

(P. 47). "And whereas great inconvenience may happen, and damage be done to particular persons, by reason of searching for, winning, and working the said mines and quarries within and under their respective allotments, not only the more improvable parts of the said moors or commons, but also of the less improvable parts thereof, after

1845.

MIDGLEY

v.

RICHARDSON.

tent of the powers intended to be reserved to or conferred on the bishop. On the part of the plaintiff it was argued,

the same may be accepted and inclosed by virtue of this act, as hereinafter is directed and provided, by the said Lord Bishop of Durham and his successors, and his and their lessee and lessees and assigns, without paying any damages or making any satisfaction for so doing; for remedy whereof be it enacted, that when and so often as any person or persons shall suffer or sustain any loss or damage in his, her, or their respective allotment or allotments, by the searching for, winning, or working of the said mines and quarries therein, or the leading or carrying away the coals, lead, minerals, stones, or other things to be gotten thereout, or out of any other mines or quarries belonging to the said Lord Bishop of Durham and his successors, or by the making, laying, repairing, or using of wagon-ways and other ways, or by making drifts, levels, or watercourses, or erecting or using fire-engines or other engines, or making or using pit-rooms or heap-rooms, or using any of the other of the powers or liberties reserved to and for the said Lord Bishop and his successors, and his and their lessee and lessees and assigns, as aforesaid, such person or persons so damnified, upon making such complaint, shall receive such satisfaction for such damage as hereinafter is directed in that behalf. And for that and other purposes be it enacted, that the said last-mentioned allotment or parcel of ground, directed to be set out to the said justices as afore-

said, shall, from and immediately after the execution of the said commissioners' general award, be, and be deemed to be vested in, and enure to the use of the said justices of the peace and their successors for the time being, for ever, to, for, and upon the several trusts, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same; (that is to say), upon trust that the said justices, assembled at any of their general quarter sessions of the peace to be holden for the said county, or at any adjournments thereof, or any two or more of them, shall or may, and they are hereby required from time to time, by indenture of lease or otherwise, as they shall think fit, to let or demise all or any part of the said premises to any person or persons, for any term or number of years not exceeding twenty-one years from the making of such lease or demise, for the best and most approved yearly rent or rents that can be reasonably had or obtained for the same, [and upon further trusts therein mentioned]; and, after deducting all necessary charges and expenses attending the execution of the said trusts, from and out of the net clear rents and profits of the said premises, the residue or clear balance thereof shall from time to time be paid, applied, and disposed of in manner following; (that is to say), upon the complaint and application of any person or persons so to be damnified by the working of mines or quarries, or any other of

that no right was meant to be given to the bishop beyond that of working the mines under the moors, and making and using the necessary ways for that purpose; and reliance was placed on the case of *The Durham and Sunderland Railway Company v. Walker*, where, on a somewhat similar question, the construction now contended for by the plaintiff was adopted by the Court of Queen's Bench. But that case does not appear to us to warrant the interpretation which we are asked to put on this clause. That decision was founded altogether on the language and context of the deed which was there in question, and cannot help us in the construction of this act. Here the lord was, by the inclosure, except so far as he is protected by the clause in question, deprived of all rights on the moors to be inclosed, amounting to from twelve to twenty thousand acres, without getting any allotment to himself, or other compensa-

1845.
MIDGLEY
v.
RICHARDSON.

the liberties or privileges concerning the same hereinbefore mentioned, (which complaint and application may be made in person, or by agent, counsel, or attorney), to the said justices of the peace, at their sessions or adjournments, (notice in writing of such intended complaint being affixed upon the most usual door of the parish church of Lanchester, and of the chapels of Medomsley, Edchester, and Sattle aforesaid, respectively, on some Sunday morning before Divine service, at least eight days preceding such complaint), such justices shall and they are hereby required and empowered to examine and inquire into such complaint or complaints in a summary way, either by examination of the party or parties, or his, her, or their witnesses upon oath, (which oath the said justices, or any one of them, is and are re-

quired and empowered to administer), or by such other evidence and proofs, ways and means, as to them shall seem requisite and expedient in that behalf, and finally to settle, ascertain, and determine the damages sustained by the person or persons so complaining as aforesaid; and thereupon the said justices, or any two or more of them, shall, and they are hereby required to order and direct their said steward, clerk, agent, and receiver, forthwith, upon demand, to pay the same, together with reasonable charges on account of making and prosecuting such complaint, (to be also fixed and settled by the said justices), unto the person or persons so complaining, his, her, or their agent or attorney, or to such other person or persons as the said justices shall direct and appoint to receive the same," &c.

1845.
 MIDGLEY
 v.
 RICHARDSON.

tion, except an annual quit-rent of 4s. per acre ; so that it is not unreasonable to suppose that he should have stipulated for, and that the Legislature should have guaranteed to him, rights of making and using ways and other easements over the lands to be inclosed, extending beyond those necessary for working the mines under the lands to be inclosed ; more especially considering the strong probability, that, at the time when the act passed, the bishop was, in fact, exercising such rights for the convenience of all his mines, wherever situate. And it seems to us impossible to put on this clause the narrow construction contended for by the plaintiff, without shutting out of it the words " and also of all other mines and quarries belonging to the see and bishopric of Durham, wheresoever the same are or be." There *other mines and quarries* are put in express opposition to the mines and quarries under the moors to be inclosed, and must, according to the plain meaning of the words, include all other mines belonging to the see.

We should hardly have thought that this could have admitted of any reasonable doubt, even if the matter had rested exclusively on the clause to which we have referred ; but the subsequent clause, (p. 45), to which our attention was pointed, makes the matter still clearer. The act contains a provision, that a portion of the lands to be inclosed, amounting to 500 acres, should be allotted to and vested in certain trustees ; and the trust is declared (p. 45) to be, that, when and as often as any person shall suffer damage in his allotment of the moors, by the digging of coals therein, or by carrying away of minerals to be gotten thereout, or *out of any other mines or quarries belonging to the Bishop of Durham*, or by making ways, or erecting engines, or using any other of the privileges reserved to the bishop, then the trustees shall indemnify such person in the manner provided by the act. The indemnity is provided, not only against injuries resulting from working the

mines under the moors, but also against all loss or damage sustained in any allotment by reason of the carrying coal gotten from any other mines of the bishop, or by the making ways, or erecting engines, or using the other powers reserved to the bishop; which must mean making ways, or erecting engines, or using any of the other powers, for the purpose of working any of the mines of the bishop, or carrying the coal from any such mines. An indemnity being thus provided against injuries arising from making ways for carriage of coals from other mines, it follows, as a necessary consequence, that such carrying of coals from other mines was one of the privileges intended to be conferred on, or rather reserved to, the bishop by the prior clause. If there was no right to carry such coal over the inclosed lands, it would have been unnecessary to provide an indemnity. On the part of the plaintiff, indeed, it was contended, that the other mines intended by the act were such mines only as should (though situate beyond the inclosed moors) be worked by means of shafts and pits sunk within them. For this restriction, however, we can discover no grounds in the language of the act, or in the probable motives of the Legislature, which certainly seem to have been to secure to the bishop the same right of carrying the produce of his mines over the moors in their inclosed state, as he had exercised previously to the passing of the act.

But, with respect to coals gotten from other mines, not belonging to the see, we do not think there are sufficient words in the clause (p. 43) to give the bishop, or his assigns, the right of carrying them over the commons, and laying waggon-ways for that purpose. It is true, that the words "other lands and grounds whatsoever" occur in the clause, but this, we think, must have been for the purpose of extending the bishop's right to *lands and grounds* other than *mines*, so as to include quarries, chalk-pits, marl-pits, and the like, not strictly coming under the description of *mines*. The Legislature could not have in-

1845.
MIDGLEY
v.
RICHARDSON.

1845.
MIDDLEY
v.
RICHARDSON.

tended to give the power of conveying coals gotten from the mines of strangers, first, because there is no corresponding power of going to such mines for the purpose of working them; and, secondly and mainly, because no compensation is provided (p. 47) for any injury arising from the carriage of coal from the mines of strangers; the compensation being expressly confined to cases of injury arising from the working of any mines or quarries of the see, or the using of any liberties or privileges concerning the same. And it is unreasonable to suppose that the Legislature meant to give powers whereby damage might accrue to the occupier, for which he was not to receive any compensation, either from the bishop or from the fund provided by the act.

We are therefore of opinion that the right of the bishop extends to the produce of all his own mines, but not to that of the mines of others; and the only question therefore is, whether the plea sufficiently avers that the Derwent Colliery, from which the coal in question was to be conveyed, was a mine belonging to the see. The averment, that the lands were parcel of *the manor*, is equivalent to an averment that they were parcel of *the demesne*. But they might be part of the demesnes which were copyhold, and the mines might by the custom belong to the copyhold tenant; and, as the plea is to be taken most strongly against the party pleading, we think the mines are not sufficiently alleged to belong to the see, and consequently our judgment must be for the plaintiff. But the defendant may, if the facts warrant it, have liberty to amend, by stating distinctly that the Derwent Colliery is parcel of the possessions of the see of Durham.

Leave to amend accordingly; otherwise

Judgment for the plaintiff.

1845.

July 9.

WIGGINS and JAMESON v. JOHNSTON.

THIS was an action of assumpsit, stated in the particulars of demand to be brought to recover 963*l.* 11*s.* 4*d.*, balance of freight per ship "Harmony," due from the defendant to the plaintiffs.

The declaration stated, that the defendant was indebted to the plaintiffs in £3000, for freight and reward due and payable from the defendant to the plaintiffs for and in respect of the carriage and conveyance of divers goods, merchandizes, and chattels, by the plaintiffs before that time carried and conveyed for the defendant, and at his request, in and on board of a certain ship or vessel, from divers ports and places to divers other ports and places, and there, to wit, at the last-mentioned ports and places, delivered by the plaintiffs for the defendant, at his request, and in £3000 for money due from the defendant to the plaintiffs on an account stated between them; and that the defendant promised to pay the said sums on request; and concluded with the usual breach.

The defendant pleaded to the whole of the declaration, that he did not promise as alleged; and further pleaded, as to 70*l.* 4*s.* 9*d.*, parcel of the sum of £3000 in the first count of the declaration mentioned, payment to the plaintiffs and acceptance by them of the sum of 70*l.* 4*s.* 9*d.* in satisfaction.

The plaintiffs joined issue on the first plea, and traversed, were at liberty to make such alterations in the charter-party as they might mutually think proper, without prejudice to that agreement. Soon after the arrival of the ship at Bombay, the master and G. & Co. entered into a written agreement (which was indorsed on the second charter-party) that the ship might proceed to Aden with government coals and stores (her outward cargo), and return to Bombay with all possible despatch, without prejudice to the charter-party. She accordingly, in the month of February, sailed to Aden, and there discharged her cargo, and returned to Bombay, where she arrived in May. The owners received a large sum as freight for this voyage to Aden:—*Held*, that the defendant was bound by the alteration made in the charter-party by G. & Co., permitting the voyage to Aden, which was within the scope of the authority given to them by the stipulation above mentioned; and therefore that he was bound to pay the charter-rate of £3 per ton for half the cargo, although that exceeded the current rate of freight at the time of the loading, and although the alteration might be prejudicial to his interests; and that he was not entitled to have the freight earned by the owners on the voyage to Aden brought into the account.

The defendant chartered a vessel for a voyage from London to Bombay, at which port she was addressed to G. & Co., the defendant's agents there; and by another charter-party of the same date, it was agreed that the ship should, after discharging her cargo at Bombay, take in a homeward cargo, for which the defendant agreed to pay freight, as to one-half the cargo, at £3 per ton, and as to the rest, at the current rate of freight when the ship should be loading. In this latter charter-party there was also a stipulation, that the master of the vessel (who was a part owner) and G. & Co., the agents at Bom-

1845.
WIGGINS
v.
JOHNSTON.

versed the second, on which the defendant has joined issue.

By the consent of the parties, and by the order of *Alderson*, B., the following case has been stated for the opinion of the Court since issue was joined :—

On the 1st day of August, 1842, the plaintiffs (by Mr. Wiggins, their agent mentioned in the following charter-parties) and the defendant entered into and signed the two charter-parties, of which the following are copies :—

“ London, 1st August, 1842.—It is this day mutually agreed between Mr. Wiggins, for the owners of the good ship or vessel called the ‘ Harmony,’ of the measurement of 830 tons or thereabouts, now in the port of Liverpool, and Mr. Robert Johnston, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible despatch proceed direct to Clyde, to be loaded at Greenock, free of lighterage to the ship, and there load, in the usual and customary manner, in regular turn, at any one of the collieries freighters may name, a full and complete cargo of coals, not less than 750 nor more than 1000 tons, which said freighter binds himself to ship, with liberty to take any light freight which may offer, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to Bombay, to sail in fifteen days after the coals are on board, or so near thereunto as she may safely get, and deliver the same into craft which will be sent alongside for that purpose: notice to be given to the agents of the vessel being ready to discharge, (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage always mutually excepted): the freight to be paid at and after the rate of 20*s.* per ton of 20 cwt. on the quantity delivered in full; and such freight is to be paid, say one-third by

bill at two months from the final sailing of the vessel from her last port in Great Britain, or in cash under discount, the same to be returned if the vessel be lost, the freighter having power to insure the amount and deduct it from the first payment of freight; and the remainder in rupees to the master, at the exchange of 2s. 2d. per rupee, on right delivery of the cargo. The vessel to take turn to delivery as customary, not less than twenty-one tons per day. If the vessel return to London, she is to be addressed to and reported at the Custom-house by Henry and Calvert Toulmin, of No. 8, George-yard, Lombard-street, to whom the commission on this charter-party is due, ship lost or not lost. Penalty for non-performance of this contract, £1000. The vessel to be addressed to freighter's agents at Bombay."

"London, 1st August, 1842.—It is this day mutually agreed between Mr. Wiggins, for the owner of the good ship or vessel called the 'Harmony,' of the measurement of 830 tons or thereabouts, now at Liverpool, and Mr. Robert Johnston, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Bombay with coals from Clyde, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of cotton, or other legal merchandize, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to London, Liverpool, or Clyde, as may be determined at Bombay—if London, in any dock the said freighter may appoint, or so near thereunto as she may safely get—and deliver the same on being paid freight at and after the rate of £3 per ton for half of the cargo; the remainder of the cargo to be procured at the current rate of freight at the time the ship be loading; upon which freighter's agents are to be

1845.
WIGGINS
v.
JOHNSTON.

1845.
 WIGGINS
 v.
 JOHNSTON.

paid by the owners the usual commission for procuring the same, and the tonnage of the whole to be computed according to the new schedule of tonnage now in use at Bombay, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted): the freight to be paid on unloading and right delivery of the cargo, in cash, two months after the report of the ship inwards at the Custom-house, or under discount: eighty running days are to be allowed the said merchant (if the ship is not sooner despatched) for loading the said ship at Bombay, to commence from the period of the vessel being ready to load, the master giving freighter's agents written notice to that effect, and ten days on demurrage over and above the said laying days, at £10 per day: the vessel to be consigned to Henry and Calvert Toulmin on her return to London, with whom the original charter-party is deposited. Penalty for non-performance of this agreement, £3500. The master to sign bills of lading for half of the cargo, at any rate of freight not less than the current rates, without prejudice to the charter-party, and for the remaining half at the current rates of freight at which the cargo is procurable. It is also further understood and agreed, that the master of the vessel, and the agents at Bombay, are at liberty to make such alterations in this charter-party as they may mutually think proper, without prejudice to this agreement."

The above charters were both made and entered into at the same time, and in pursuance of them the vessel sailed from Greenock with coals for Bombay, in September, 1842, addressed (on the nomination of the defendant) to Messrs. Grey & Co., at Bombay, as the agents of the defendant, and arrived at Bombay on the 31st January, 1843. Meantime, namely, on the 6th December, 1842, in London, the defendant entered into an agreement in writing

with Messrs. Grey, Coles, & Co., who carried on business under that name in London, and under the said firm of Grey & Co. at Bombay, as merchants, of which the following is a copy:—

1845.
WIGGINS
v.
JOHNSTON.

Dec. 6th, 1842.—Messrs. Grey, Coles, & Co., London.—
“It is this day mutually agreed between Messrs. Grey, Coles, & Co., London, and Robert Johnston, charterer of the ship ‘Harmony,’ bound from the Clyde to Bombay, that the said ship shall be addressed at Bombay to Messrs. Grey & Co.; in consideration thereof the said Messrs. Grey & Co. hereby engage to furnish her with a full and complete cargo of legal merchandize for London, Liverpool, or the Clyde, at the current rates of freight; and the said Robert Johnston hereby agrees to allow unto the said Messrs. Grey & Co., of Bombay, a commission of £5, say £5 per cent. upon amount of freight the ship may make. The cargo to be furnished within eighty days from the date she is ready to receive it, or Messrs. Grey, Coles, & Co. to pay demurrage according to Mr. J.’s charter-party with the owners annexed.

(Signed)

GREY & Co., London.

R. JOHNSTON, London.”

A copy of the charter-party secondly above set forth was annexed to this agreement.

Such agreement was entered into without the knowledge of the plaintiffs, nor was any notice thereof given to them. Messrs. Grey & Co. had not any authority or instructions to enter into the agreement hereinafter mentioned for the intermediate voyage to Aden, except so far as such authority or instructions were conferred by or contained in, or may reasonably be inferred from, the charter-party secondly above mentioned, and the agreement of the 6th of December, 1842, and the facts and other documents stated in this case, or any of them.

1845.
WIGGINS
v.
JOHNSTON.

Shortly after the arrival of the vessel at Bombay, namely, on the 13th of February, 1843, the said Messrs. Grey & Co., being such agents as aforesaid for the defendant at Bombay, and the plaintiff James Jameson, the master of the vessel, agreed, that, before loading her homeward cargo, the said vessel might proceed on an intermediate voyage to Aden, and the following memorandum was accordingly indorsed on the charter-party secondly above set forth, and signed by the said Messrs. Grey & Co. and the plaintiff James Jameson respectively:—"It is hereby agreed that the ship 'Harmony' may proceed to Aden with the government coals and stores, &c., and return to Bombay with all possible despatch, without prejudice to charter-party, as per annexed copy." In pursuance of this agreement the plaintiffs entered into a charter-party with the East India Company, for the ship to proceed to Aden with the government coals and stores (being the cargo laden at Greenock as aforesaid), and return to Bombay as agreed upon as above mentioned; and in pursuance of this charter, the ship sailed with the cargo last above mentioned, from Bombay, on the 16th of February, for Aden, and after discharging there, returned with all possible despatch to Bombay, which she reached on the 11th of May, 1843. The freight earned by the voyage under the said charter with the East India Company was £1100, which the plaintiffs received of the East India Company.

Messrs. Grey & Co., at Bombay, by letter written at that place on the 28th of February, 1843, communicated to Messrs. H. and C. Toulmin, in London, they being the ship-brokers of the defendant in London, the fact of their having made the above alteration in the second charter, and arrangement for the vessel to make the intermediate voyage to Aden and back. This letter reached Messrs. Toulmin in London in April, and by the next mail they, by the defendant's authority, wrote and sent to Messrs. Grey &

Co. a letter, dated 1st of May, 1843, of which the following is a copy :—

[The case then set out this letter, which expressed the defendant's disapprobation of the arrangement for the voyage to Aden, and his belief that it was detrimental to his interests, but contained no express affirmation or repudiation of it.]

This letter reached Grey & Co., at Bombay, in the middle of June, 1843. This period, including the months of March, April, and May, is usually the best period of the year for procuring cargoes and high rates of freight from Bombay to parts in Great Britain; and the period from the beginning of June to the end of July, being the rainy season, is usually in each year a bad time for procuring cargoes or good rates of freight from Bombay to the said ports.

The rates of freight from Bombay to ports in Great Britain were higher when the "Harmony" first arrived at Bombay, as aforesaid, than when Messrs. Grey & Co. procured her a cargo for London, as hereinafter mentioned.

In the ordinary course of things, a ship sailing in the middle of February from Bombay would perform the voyage to Aden, discharge there, and return to and reach Bombay by the middle of May, and before the commencement of the rainy season; and the time of performing such a voyage was generally known to merchants and ship-owners when the above charter-parties were entered into.

A ship at Bombay is sometimes unable, or it is found difficult, to procure a cargo or good rates of freight for London, Liverpool, or the Clyde, when a cargo or good rate of freight for some other port in Great Britain, or in Holland, may be obtained; and this fact was generally known to merchants and ship-owners when the above charter-parties were entered into.

Shortly after the vessel's return to Bombay, the said Messrs. Grey & Co. proceeded to procure a cargo for

1845.
WIGGINS
v.
JOHNSTON.

1845.
 Wiggins
 v.
 Johnston.

her, and obtained one, amounting to 1110 tons, for London, at rates averaging 25*s.* 4*d.* per ton, which were the then current rates of freight. With this cargo she sailed from Bombay on the 31st of July, 1843, and reached London on the 11th of November, 1843, where her cargo was duly delivered; and the plaintiffs received the freight arising from this home voyage, amounting to 1402*l.* 9*s.* 6*d.*, of one-half of the amount of which, namely 701*l.* 4*s.* 9*d.*, the defendant is to be at liberty to avail himself under the plea of payment: but the plaintiffs claim of the defendant the difference between the said sum of 701*l.* 4*s.* 9*d.*, being the amount of the current rates of freight on half the cargo, and 1664*l.* 16*s.*, being the chartered rate of 2*l.* per ton on half the cargo, which difference amounts to 963*l.* 11*s.* 3*d.*, and is the sum for which this action is brought.

It is agreed that the Court may draw such inference from the facts above stated as a jury would be warranted in doing.

The question for the opinion of the Court is, whether the defendant is bound by the said alteration made in the said charter-party by the said Messrs. Grey & Co. and the plaintiff James Jameson; and if so, whether the defendant is entitled to be allowed for the said freight produced by the voyage to Aden and back, or any and what part thereof.

If the Court shall be of opinion that the defendant is bound by the alteration, then the defendant agrees that a judgment shall be entered against him, by confession, for 963*l.* 11*s.* 3*d.*, or so much thereof as the Court may adjudge to be recoverable, (subject to such deduction, if any, as the Court may think him entitled to in respect of the freight of the intermediate voyage), besides costs, immediately after the decision of this case, or otherwise as the Court may think fit; but if the Court shall be of opinion that the defendant is not so bound, then the plaintiffs agree

that a judgment shall and may be entered against them of nolle prosequi immediately after the decision of this case, or otherwise as the Court may think fit.

The case was argued in last Trinity Term (May 28th) by

1845.
WIGGINS
v.
JOHNSTON.

Crompton, for the plaintiffs.—The defendant is bound by the alteration made in the charter-party by Grey & Co., who were his agents at Bombay; and he has, therefore, no claim for an allowance in respect of the freight produced by the voyage to Aden. The terms of the second charter-party, by which the master and the agents at Bombay were at liberty to make such alterations in it *as they might mutually think proper*, clearly authorized that which was done by Grey & Co.; and the subsequent correspondence amounts in effect to an adoption of their act by the defendant. In *Galloway v. Jackson (a)*, the plaintiff sued for a demurrage upon a charter-party, by which the ship was to be allowed forty-four running days for loading at Cardiff and unloading at Alexandria, to commence on the 16th of December, 1834; and the declaration averred, that the ship, then being at Pembroke, by and with the consent of the plaintiffs and defendant, and at the request of the defendant, remained at Pembroke for the purpose of receiving coals, part of her cargo for the voyage, in lieu of loading such coals at Cardiff; and that she was, without any default or neglect of the plaintiffs, detained for that purpose at Pembroke until the 17th of December, 1834. The defendant pleaded, that he did not consent *and request* that the ship might remain at Pembroke, as alleged in the declaration; and upon issue taken on this plea, the jury found that the defendant had *consented* to the new arrangement, but that the plaintiffs and not the defendants made the *request*. It was held, that consent only was material, and that the verdict so found upon that issue was a

(a) 3 Man. & G. 960; 3 Scott, N. R., 753.

1845.
 WIGGINS
 v.
 JOHNSTON.

verdict for the plaintiffs. So, here, the defendant is clearly bound by his consent given through his agents expressly authorized for that purpose. [He cited also *Clipsbam v. Vertue* (a).]

Peacock, contra.—The alteration made in this charter-party is in fact a new contract, and therefore justice requires that the defendant should only pay according to the current rate of freight which would have been earned by the vessel at that time. If the agents had no authority (as they certainly had not) to enter into a *new charter-party*, the owner is not bound by such an agreement. The questions are, first, whether the alteration was authorized; secondly, whether the correspondence shews a ratification of it by the defendant. [*Pollock*, C. B.—I think nothing turns upon the correspondence; the defendant's letter neither adopts nor rejects it.] The only question therefore is, whether the agents at Bombay had authority, on behalf of the owners, to enter into an intermediate contract of charter-party with the government there. The case of *Rex v. Peto* (b) is an important authority for the principles there laid down by the Court. The question there was, how far an obligor, who bound himself to perform certain works according to a specification and drawings, with power for the obligee, by his surveyor, to direct *additions* or *omissions*, was bound by orders given by the surveyor to *vary* and *deviate* extensively from the original plan. *Alexander*, C. B., there says (c), "Is it possible that this clause was intended to give to the surveyor—a person who ought to be in general but an overlooker of the owner, to see that the work is actually performed—a power to vary the whole scheme of the building; or, if it were so intended, that it could have been expressed in such language? In sound construction, it should be limited to that to which the con-

(a) 5 Q. B. 265.

(b) 1 Y. & J. 37.

(c) P. 53.

dition has confined it, namely, to such extra works as may be done, or something which is omitted; but it cannot refer to the substitution of one thing for another." The same principle applies here. This is not adding to the contract, but altering the scheme of it altogether. It matters not that Grey & Co. might think this alteration was for the benefit of the freighter; the question is, whether, under this stipulation, they had the power to direct it. Could they have sent the vessel home, and let her come out again a year afterwards? The meaning of this clause clearly was only to authorize them to make some small addition to or deviation from the homeward voyage, such as that the ship might call at intermediate ports, but not to empower them to enter into an intermediate contract, which must endure for months, even though that contract *might possibly* be beneficial to the freighter. This alteration clearly would have avoided a policy of insurance on the ship as being a deviation: it is a change of the whole scheme of the contract. [Pollock, C. B.—Might not the agents have bargained for a greater number of lay days at a stipulated price?] No doubt; but there it remains the same contract. [Pollock, C. B.—Then is it not the same contract if they say, "We see we shall not want the ship for a certain time, and, instead of her lying idle, you shall use her for a short intermediate voyage?" If that voyage were of an unreasonable extent or duration, as to the North Pole, it would be a different case; but this is merely postponing the commencement of the charter-party until after the performance of a short intermediate voyage.] It comes back to the same question, whether it is not a different voyage from that stipulated for by the charter-party. [Pollock, C. B.—No; it is merely postponing the commencement of the second charter-party, and allowing the owners to use the ship in the meantime. No doubt it would discharge a policy of insurance; as to that it is a different voyage; but as to the charter-party, it is a mere postponement of

1845.
WIGGINS
v.
JOHNSTON.

1845.
 WIGGINS
 v.
 JOHNSTON.

the voyage. Could not the agents have altered the terminus ad quem, and *added* a port of destination?] The defendant contends they could not. The question is not whether the agents have acted to the best of their discretion; but what is the discretion vested in them. Here, however, probably, the alteration was injurious to the defendant, because the intermediate voyage was during the period when high freights were obtainable at Bombay. At all events, the freight earned by the voyage to Aden ought to be brought into account between the plaintiffs and the defendant.

Crompton, in reply.—It is no test of the present question, whether an *insurance* would have been avoided by this alteration; because the agents clearly have power to make *some* alterations in the charter-party; for instance, to introduce an intermediate port; but *that* would equally vitiate an insurance on this charter-party. A mere postponement of the voyage would be an alteration of the charter-party which would render a new stamp necessary. But if the agents are at liberty to postpone the voyage, surely they have also authority to agree to the employment of the ship on another voyage in the meantime. Could they not have allowed the owner to use her as a hulk in a river for some days? The terms of the contract are to be construed rather against the freighter, because he is the party speaking. *Rex v. Peto* is quite distinguishable; there the authority given to the surveyor was merely to make omissions in, or additions to, the building contracted for. Each case must stand upon its own particular circumstances; and in the case of a mercantile agency abroad such as this, the Court will give it as wide scope as is consistent with a reasonable construction of the contract. The agents have power, being on the spot, to make arrangements as to the homeward voyage. Is not this in fact the homeward voyage, and would not a jury so find?

Cur. adv. vult.

The judgment of the Court was now delivered by

1845.
WIGGINS
v.
JOHNSTON.

ROLFE, B.—The question in this case turns on the construction of a clause contained in a charter-party. The plaintiffs were owners of the ship "Harmony," of which the plaintiff Jameson was also the master. The plaintiffs, on the 1st day of August, 1842, entered into a charter-party with the defendant, whereby they agreed to charter the ship to him for a voyage to Bombay, at which port she was to be addressed to the defendant's agents. On the same day they also entered into another charter-party with him, whereby they agreed that the ship should, after discharging her cargo at Bombay, take in a homeward cargo, for which the defendant agreed to pay freight, as to one-half the cargo, at £3 per ton, and as to the rest, at the current rate of freight when the ship should be loading. At the end of this second charter-party is the following clause:—"It is also further understood and agreed, that the master of the vessel, and the agents at Bombay, are at liberty to make such alterations in this charter-party as they may mutually think proper, without prejudice to this agreement."

The ship sailed from Great Britain pursuant to the first charter-party, and reached Bombay on the 31st of January, 1843, and, on the nomination of the defendant, she was addressed to Messrs. Grey & Co. as his agents there. Soon after her arrival, the plaintiff Jameson (the master), and Messrs. Grey & Co., as agents of the defendant, entered into a written agreement, which was indorsed on the second charter-party, and whereby they agreed that the ship might proceed to Aden with the government coals and stores, and return to Bombay with all dispatch, without prejudice to the charter-party.

In pursuance of this arrangement, the ship sailed to Aden, and there discharged her coals, &c., and returned to Bombay, where she arrived on the 11th of May. The owners received above £1100 as freight for this voyage to

1845.
 WIGGINS
 v.
 JOHNSTON.

Aden. On the return of the ship to Bombay, the defendant's agents procured her a cargo at the rate of 1*l.* 5*s.* 4*d.* per ton, being the then current rate of freight. With this cargo she sailed from Bombay, and reached London on the 11th of November, 1843. The plaintiffs received the whole of the freight (£1402); and this action was brought to recover, as to one-half of the freight, the difference between the charter-rate of £3 per ton and the sum actually received, namely £701; and it was agreed that the difference amounts to 963*l.* 11*s.* 8*d.*

The point therefore is, whether the plaintiffs are entitled to claim from the defendant the charter-rate of £3 per ton; and that depends on the question, whether the voyage from Bombay to London was the voyage in respect of which the defendant, by his contract, agreed to pay freight at that rate. The defendant contends that it was not, for that, by the two contracts taken together, the ship was to proceed to Bombay, and then, after discharging the cargo, return forthwith to London; whereas, after her arrival at Bombay, the plaintiff Jameson and the defendant's agents agreed, for the exclusive profit of the owners, to allow the ship to make a new voyage, intermediate between her voyage out and her voyage home, whereby the defendant contends that his obligation under the charter-party was at an end. But it must be observed, that the charter-party contained an express clause enabling the plaintiff Jameson and the defendant's agents at Bombay to make any alteration in the charter-party which they might deem expedient; and we think this clearly authorized the defendant's agents to accede to the proposed voyage to Aden. It was said by the defendant's counsel, that the meaning of the clause was merely to enable the parties to make further stipulations at Bombay as to the homeward voyage, to authorize the touching at other ports, and to make trifling changes of that nature. But we are unable to fix any limits as to the extent of authority given—certainly none that can enable us to say

that what was done was beyond the scope of the authority. Several facts are stated in the case, strongly tending to shew that the delay occasioned by the voyage to Aden was likely to cause, and that it did in fact cause, great injury to the defendant's interest. This may give him a good ground of action against his agents, but cannot at all shew that the agents had not authority to take the course they did take. They had authority to make any alterations in the charter-party which they should think proper. They did think proper to alter it, by stipulating, that, instead of unloading at Bombay, and there forthwith taking in a homeward cargo, the ship should go and discharge at Aden, and then return to Bombay for her cargo. This was to be done expressly without prejudice to the charter-party, which means, was to be done without affecting the charter-party, otherwise than by interposing the intermediate voyage to Aden. Under these circumstances, it appears to us clear that the obligation of the defendant to pay the £3 per ton remained unaffected. It was contended, that, at all events, the freight earned by the voyage to Aden ought to be brought into account; but we see no ground whatever for this. The meaning of the parties obviously was, that the owners should have the vessel for their own benefit on the interposed voyage. This it was which formed the subject of complaint on the part of the defendant: and the case states, that, as soon as the new agreement was entered into at Bombay, the plaintiffs entered into a charter-party with the Indian Government for the voyage to Aden. If the defendant had been intended to participate in any way in the benefit of this voyage, it would have been so stipulated. Nothing of the sort appears; and we are therefore of opinion that he can have no abatement on this account.

The result is, that the plaintiffs will be entitled to our judgment for the full amount of 963*l.* 11*s.* 3*d.*, for which the action is brought.

Judgment for the plaintiffs.

1845.
WIGGINS
v.
JOHNSTON.

1845.

July 9.

PIPER and Others v. CHAPPELL.

The Plumbers' Company of London were incorporated by a charter of James I., and empowered thereby to make bye-laws. They made a bye-law, that the master and wardens might call, choose, elect, and admit into the livery of the company such person free of the art or mystery of plumbing as they should think fit; and that every person so chosen

should, immediately upon notice thereof, prepare himself to serve the same place at the then next meeting of the master and wardens, in such seemly and decent manner as formerly had been used; and that every person, so called and chosen into the same livery, and accepting the same, should use, wear, and keep the same livery, according to the usage and warning given him for that purpose; and that the same person, so called and chosen into the same livery, and accepting the same, should bring in and pay at the next meeting, unto the master and wardens, to the use, maintenance, and relief of the company, and to the officers of the company, for entering the same, and for the warning given, such fees as formerly had been paid in like cases; "and which of them soever, so called and chosen into the same livery, refuseth to pay the said fees, or what person or persons, so called and chosen to be of the same livery, and refuseth the same, shall forfeit and pay to the master and wardens for the time being, for every such default, the sum of £5, or less at the discretion and pleasure of the master and wardens, so it be not less than 40s."

In a declaration in debt on this bye-law, against a person who had been elected into the company, and taken the oath to obey the bye-laws:—

Held, first, that the bye-law was not bad for uncertainty in the amount of the penalty:

Secondly, that the declaration was not bad for not shewing that the company was a company that had a livery, a livery being mentioned in the charter and bye-law:

Thirdly, that it was not bad for not shewing that the defendant was a freeman of the city of London; for that the Court could not take notice that none but freemen of the city were admissible into the livery of a company, unless it had been certified to the Court by the Recorder of London:

Fourthly, that the master and wardens alone might sue for the penalty, though it was reserved to the use of the company generally.

The breach alleged in the declaration was, that the defendant, although requested, and although a reasonable time had elapsed, and although he was and continued such freeman, did not nor would attend or serve the said place to which he had been so chosen, and did not nor would attend and serve the said place at the next meeting, or at any subsequent meeting of the master and wardens, but therein made default, and refused to prepare himself to serve the said place:—*Held*, that the breach was well assigned; for that one refusal, to which by the bye-law the penalty was attached, was the refusal to prepare to serve, and to serve at the next court.

of the City of London," should be persons capable of purchasing and holding lands, &c. to them and their successors in fee; and that it should be lawful for them to have, retain, and appoint a council-house or hall within the said city of London; and that the same master, wardens, and commonalty, &c. for the time being, and their successors, or six of them at the least, (of whom the said master and wardens should be three, or the master and one of the wardens should be two), should and might call and hold within the same council-house or hall, a certain court or convocation of the same master, wardens, and commonalty, &c., and in the same court or convocation they should and might be able to treat, confer, consult, advise, and determine respecting the statutes, articles, and ordinances touching and concerning the aforesaid master, wardens, and commonalty, and the good rule, state, and government of the same, according to their sound discretion. And further, that the aforesaid master, wardens, and commonalty of the freemen of the mystery of plumbing aforesaid for the time being, or six of them, (of whom the master and wardens for the time being should be three, or the master and one of the wardens should be two), assembled thereto upon public summons thereof to be made, should and might have full and absolute power and authority to frame, constitute, ordain, and make, from time to time, whatsoever reasonable laws and statutes, ordinances, decrees, and constitutions in writing, which to them, or six of them at the least, (of whom the said master and wardens should be three, or the master and one of the wardens aforesaid should be two), should seem good, wholesome, useful, honest, and necessary, according to their sound discretions, for the good rule and governance of the aforesaid master, wardens, and commonalty of the freemen of the mystery of plumbing aforesaid, and of all other persons the aforesaid art or mystery of plumbing for the time being exercising, using, or in any manner occu-

1845.
PIPER
&
CHAPPELL.

1845.
PIPER
v.
CHAFFELL.

pying within his said late Majesty's city of London, in the suburbs and precincts of the same, and within seven miles of the same city, and for the declaring in what manner and order the same master, wardens, and commonalty of the mystery aforesaid, and all and singular other persons for the time being using, exercising, or occupying the same art or mystery within the said city of London, the suburbs and precincts of the same, and within seven miles of the same city, should demean, bear, and use themselves in their offices, mystery, and arts, for the more abundant public good and common weal of the same master, wardens, and commonalty of the mystery aforesaid, and other things and causes whatsoever touching or in anywise concerning the art or mystery aforesaid; and that the said master, wardens, and commonalty of the mystery aforesaid for the time being, or six of them at least, (of whom his said late Majesty thereby willed always that the master and wardens of the mystery aforesaid for the time being should be three, or the master and one of the wardens aforesaid should be two), so often as they should make, frame, ordain, or establish such laws, rights, statutes, institutions, ordinances, and constitutions in the form aforesaid, should and might be liable to make, limit, and provide such and the like pains, punishments, and penalties, by corporal imprisonments or by fines and amerciaments, or by either of them, against and upon all delinquents against such laws, rights, statutes, institutions, and ordinances, or any or either of them, and which to the same master, wardens, and commonalty of the mystery aforesaid for the time being, or six of them at least, (of whom his said late Majesty thereby willed always that the master and wardens of the mystery aforesaid for the time being should be three, or the master and one of the wardens aforesaid should be two), should seem most necessary, proper, and requisite for the observance of the same laws, ordinances, and constitutions; and that the same master,

wardens, and commonalty of the freemen of the mystery of plumbing aforesaid for the time being, or six of them at least, (of whom his said late Majesty thereby willed always that the master and wardens for the time being should be three, or the master and one of the wardens aforesaid should be two), should and might be able to have and levy the same fines and amerciaments, to the use of the aforesaid master, wardens, and commonalty of the art or mystery aforesaid, and their successors, without impediment of his said late Majesty, his heirs or successors, without any account or any other thing therefor to be rendered or paid to his said late Majesty, his heirs or successors: all and singular which rights, ordinances, laws, statutes, and constitutions, so as aforesaid to be made, his said late Majesty thereby willed to be observed, under the pains in the same contained.

The declaration then stated the nomination and appointment by the Crown of persons who were to be the first masters and wardens, and the mode of election annually of the future master and wardens, who should serve for one whole year, and until others should be elected. And the charter proceeded, that, in case of the death or removal for bad conduct of the master or wardens within the year, then it should be lawful for such and so many of the same master and wardens of the mystery aforesaid for the time being, and such persons as before should have been masters or wardens of the mystery aforesaid, and at that time living, and such person or persons of the livery (a) of the mystery aforesaid for the time being as should be present, or the major part of the same, (of whom the master or either of the wardens for the time being should be one), at a convenient time, at their pleasure, after the death or removal of the same master or wardens, or either of them, to elect, nominate, prefer, and

1845.
PIPER
v.
CHAPPELL.

(a) This is the only place where this word occurs in the charter.

1845.
PIPER
v.
CHAFFPELL.

swear one other person to the office of master, and one other, or two others, to the office of warden or wardens of the mystery aforesaid, according to the ordinances and provisions in those presents above declared and expressed.

The declaration, after setting out the charter, proceeded to allege, that the said freemen of the Company of the Plumbers of London accepted the same, and, by virtue of the said letters patent and of such acceptance, became and were, and from thence continually had been and still were, a body corporate and politic, in deed, fact, and name, by the name of "The Master, Wardens, and Commonalty of the Freemen of the Mystery of Plumbing of the City of London," and by the same name have succession for ever. It then alleged the acceptance of office by the persons who had been appointed the master and wardens; and that, during the first year, whilst they continued to be such master and wardens, a court or convocation was summoned and held within the council-house of the master, wardens, and commonalty of the freemen aforesaid, consisting of &c., according to the provisions in the charter, for the purpose of treating, consulting, advising, and determining respecting the statutes, articles, and ordinances touching and concerning the aforesaid master, wardens, and commonalty of the freemen aforesaid, and the good rule, state, and government of the same; and that afterwards, and before the expiration of the said year of office, to wit, on the 1st of October in the year aforesaid, and according to and in pursuance of such calling and public summoning as aforesaid, the said master, wardens, and commonalty of the freemen aforesaid, consisting &c., came to the said council-house within the said city, and then and there met, and then and there held a certain court or convocation for the purposes and objects aforesaid, and did then and there treat, consult, &c., respecting the statutes, articles, and ordinances touching

and concerning the aforesaid master, wardens, and commonalty of the freemen aforesaid, and the good rule and government of the same. And the plaintiffs further say, that the said master, wardens, and commonalty, being so convoked and assembled &c., did, in pursuance and by virtue of the said letters patent, and there, at and in such court and meeting as last aforesaid, constitute, ordain, and make in writing certain reasonable statutes &c. touching and concerning the aforesaid master, wardens, and commonalty of the freemen aforesaid, and the good rule and government of the same, according to their sound discretion, and being in fact good, wholesome, useful, and necessary for the rule and government of the aforesaid corporation, and being reasonable and proper, and not repugnant or contrary to law: and that the said statutes were exhibited before the Lord Chancellor, the Lord Treasurer, the Chief Justice of the King's Bench, and the Chief Justice of the Common Pleas, to be by them examined and approved, corrected and amended; and the said statutes and ordinances were then and there, to wit, &c., read, and all and every of them examined, corrected, reformed, approved of, and allowed by the said Lord Chancellor, &c. And the plaintiffs further say, that, amongst other the said statutes and ordinances so made and ordained and exhibited in manner and form aforesaid, and so examined, corrected, and reformed, approved of, and allowed according to the statute in such case made and provided as aforesaid, was and is a certain statute or ordinance for swearing the freemen of the said corporation, that is to say, the statute or ordinance following: that when any person shall be made free or admitted of the said company of the said art or mystery, that then and immediately, in the presence of the master and wardens for the time being in the common hall of the said company, the said person so to be made free or admitted shall take his corporal oath upon a book before the master and wardens for the

1845.

PIPER
v.
CHAPPELL.

1845.
PIPER
v.
CHAFFELL.

time being, or some of them, in their common hall, in such manner and form as by the oath or oaths hereafter appointed for that purpose is expressed, to be obedient to, and to observe and keep all the good and lawful ordinances, rules, and statutes made for the governance and political guiding of the fellowship, and further as in the said oath or oaths is more at large mentioned; and if any person so to be made free or admitted do refuse or delay to take the same oath, that then he shall forfeit and pay to the same master and wardens, at every time so refusing or delaying, 40s., to the use of the same fellowship, or more or less, after the discretion of the master and wardens for the time being; and further, to be rejected, refused, and put off from being of the same company or fellowship, and shall be reputed as a mere stranger or foreigner amongst the said company. And the plaintiffs further say, that, amongst other the said statutes and ordinances so made and ordained and exhibited in manner and form aforesaid, and so examined, corrected, and reformed, approved of, and allowed according to the statute in such case made and provided as aforesaid, was and is a certain other statute or ordinance, that is to say, for the choosing the livery of the said corporation, and which said statute or ordinance was and is in the words and to the effect following, that is to say, that at all times hereafter the master and wardens, and such as have been master or wardens of the company of the said art or mystery of plumbing, or the greater part of them for the time being, whereof the master and one of the wardens to be two, as they shall need and find cause, shall and may from time to time call, choose, elect, and admit into the livery or clothing of the said company, such person or persons free of the said art or mystery, as they shall think fit, meet, and able thereunto; and that every person and persons that shall be so in form aforesaid called or chosen into the said livery or clothing, shall, immediately upon notice or knowledge

thereof given by the said master and wardens, or any of them, or by their beadle or other officer for the time being, prepare himself to serve the same place at the then next meeting of the said master and wardens, in such seemly and decent manner, and in such sort as formerly by such persons of that place and sort hath been used; and moreover, that every person so called or chosen into the same livery or clothing, and accepting the same upon him, shall use, wear, and keep the same livery or clothing according to the usage or custom amongst the same fellowship used, and also according unto warning or summonses given unto him from the master and wardens for the time being for that purpose; and further, also, the same person and persons, so called and chosen into the said livery or clothing as aforesaid, and accepting the same, shall severally bring in and pay at the said next meeting, unto the said master and wardens for the time being, to the use, maintenance, and relief of the company of the said art and mystery, and to the officers of the said company, for entering the same into their books of remembrance and for the warning given, such fees and duties as formerly in the said company or fellowship hath been paid in like cases; and which of them soever, so called and chosen into the same livery or clothing, refuseth to pay the said fees or duties, or any of them, or what person or persons called and chosen to be of or in the same livery or clothing, and refuseth the same, shall forfeit and pay to the same master and wardens for the time being, for every such default, to such uses as aforesaid, the sum of £5 of lawful money of England, (or less, at the pleasure and discretion of the said master and wardens for the time being, so it be not under 40s.):—as by the said statutes and ordinances so made and ordained and exhibited in manner and form aforesaid, and so examined, corrected, and reformed, approved of, and allowed according to the statute in such case made and provided as aforesaid, amongst other things more fully and at large

1845.
 PIPER
 v.
 CHAPPELL.

1845.
 {
 PIPER
 v.
 CHAFFELL.

appear; and which said statutes have always, from the time of such allowance, been and still are in full force; and all which said several premises, the defendant, after and before the calling and electing, and neglect and refusal by him, as thereafter mentioned, to wit, &c., had notice. The declaration then alleged, that, before the calling and electing of the defendant into the livery of the company, he the defendant became and was a freeman of the company, and as such freeman had taken the oath required in that behalf. It then alleged, that whilst he continued to be such freeman, a council was held, and the defendant was duly elected into the livery or clothing of the corporation, of which he had due notice, and was then and there required to prepare himself to serve the same place to which he had been so called, chosen, and elected, at the then next meeting of the said master and wardens of the said corporation; and the defendant was then also warned, that, in default thereof, he the defendant would be fined and adjudged to forfeit and pay to the master and wardens for the time being of the said corporation, the sum of £5. The declaration then alleged as a breach, that the defendant, although well knowing the premises aforesaid, and although often afterwards requested so to do, and although a reasonable time elapsed for that purpose, and although the defendant was and continued such freeman as aforesaid, did not nor would prepare himself to serve the said place to which he had been so duly called, chosen, and elected in manner and form aforesaid, and did not nor would attend or serve the place aforesaid at the then next meeting, to wit, at the time and place in that behalf aforesaid, or at any subsequent meeting of the said master and wardens of the said corporation; and the defendant therein made default, and then wholly neglected and refused, and hath always hitherto neglected and refused to prepare himself to serve the same place, to which he was so duly called, chosen, and elected in manner and form

aforesaid, although, after a reasonable time had elapsed from the giving of the said notice, a court was held at the council-house, the same being the next meeting after the defendant's election, and according to the notice so given, and they were ready and willing to receive the defendant into the said livery or clothing of the corporation, &c., and although a reasonable time for the defendant's preparing to serve the same place had then elapsed: and that afterwards, to wit, on &c., at a certain court of the master, wardens, and commonalty aforesaid, and consisting of &c., duly held at the said council-house within the said city, it was adjudged and directed by the said last-mentioned court, that the defendant should be, and he the defendant was then and there, in pursuance of and by virtue of the said letters patent, and of the said statute or ordinance, fined and adjudged by such court to pay to the master and wardens for the time being, for and on account of his said default in preparing himself to serve, and refusal to prepare himself to serve as aforesaid, to the use, maintenance, and relief of the said company, the sum of £5; and it was then and there the will and pleasure of the said master and wardens for the time being, and they the said master and wardens then and there declared it to be their said will and pleasure, that the defendant should pay the said sum accordingly; which said sum of £5, so adjudged, willed, and declared to be paid by the defendant as aforesaid, had always hitherto remained and still remains unmitigated, undiminished, unforgiven, and unpardoned, and in full force, of which the defendant afterwards &c. had due notice. The declaration then alleged, that, at the time of the defendant's being so elected into the livery of the corporation, and at the time of his being so fined, the plaintiff Piper was and still is master, and the other plaintiffs were and still are wardens, of the said mystery and of the said corporation; and that the master and wardens, to whom the said sum of £5 was ad-

1845.
PIPER
v.
CHAPPELL.

1845.
 {
 PIPER
 v.
 CHAPPELL.

judged to be paid, were and are freemen of the said art or mystery; of all which the defendant had notice, and was requested by the proper officer to pay to the plaintiffs the said sum of £5: but he hath not paid the same.

General demurrer, and joinder in demurrer.

The following was the defendant's point, marked in the margin of the demurrer book:—"The defendant will contend (among other things), that the bye-law secondly above set forth is illegal and void, for the following reasons; viz., that the corporation had no power, under the circumstances, to make the said penalty payable, or to delegate the right of action for the same to the master and wardens; and also that the amount thereof ought to have been fixed, and not left to the discretion of the master and wardens."

The case was argued in Easter Term last (May 5th and 6th) by

Lush, in support of the demurrer.—First, it does not appear that this is a company which has a *livery*, and therefore this bye-law was bad. Again, the bye-law does not give the master and wardens authority to sue, but only to *levy* the fines and amerciaments. In *The Feltmakers' Company v. Davis (a)*, it was held that the master, wardens, and commonalty of a company could not sue for a penalty forfeited to the master and wardens, to the use of the master, wardens, and company: but here the penalty is, by the bye-law, to go to the use, maintenance, and relief of the company, and to its officers for entering the same. It has undoubtedly been held, that the Chamberlain of London may sue; but that was on the ground that the penalty, when recovered, was to be held by him as treasurer. It is not, however, averred here, that the company were entitled to a livery; and they could only be so entitled by prescription, or upon its being granted to them by the court of alder-

(a) 1 Bos. & Pull. 98.

men (a). The Crown could not thus grant it. In the case of *The Master and Wardens of the Society of Innholders v. Gledhill* (b), it was held, that a declaration on a bye-law compelling a person to accept the livery of a company must shew that the company had a livery. There *Ryder, C. J.*, says, "It has been said, that in divers acts of Parliament, the livery of many companies in *London* is mentioned as a thing well known; but it is very certain that some companies in *London* have no livery; and the Court cannot intend that the Company of Innholders is one of the companies which has a livery." *Foster, J.*, concurred with *Ryder, C. J.*, and *Denison, J.*, in the above opinion; and he added, that the declaration was, in his opinion, bad on another account; namely, "that it is therein only alleged that the defendant is a freeman of a company, whereas it ought to have been alleged that the defendant is a freeman of the city of *London*; because any person who keeps an inn within the distance of three miles from the city of *London*, may, by the charter of this company, be a freeman of the company, although he be not a freeman of the city of *London*." What is there added by *Foster, J.*, forms another ground of objection in the present case. In *The Master, &c., of the Vintners' Company v. Passey* (c), it is said that the right to have a livery must be founded either on *charter* or custom." The word "*charter*" there is evidently a mistake, and is put instead of *prescription*. That case was recognised in *The Poulterns' Company v. Phillips* (d). There the objection to the bye-law was, that it was too general; and *Tindal, C. J.*, there says, "The objection taken to the legality of this bye-law is this, that it empowers the company to call into the livery and clothing of the company members of the company not being freemen of the city of *London*; whereas by law such persons only as are freemen of the

1845.
PIPER
v.
CHAPPELL.

(a) Pullen's Customs of *London*, 81.

(b) 1 Sayer, 274.

(c) 1 Burr. 235.

(d) 6 Bing. N. C. 314; 8 Scott, 593.

1845.
PIPER
v.
CHAPPELL.

city of London, as well as freemen of the company, are qualified to be called into the livery or clothing of the company." Now here the only place where the word "livery" is used in this charter is that where it gives the right to elect a master or warden, on the occasion of the death of a master or warden during his year of office. The declaration does state the making of the bye-laws, but says nothing as to the livery, until it comes to the bye-law in question. But that is not at all equivalent to an allegation that the company are entitled to a livery, and there is in this declaration not a single averment upon which that fact could be traversed. The allegations in the case of *The Innholders' Society v. Gledhill* are equally strong, with the exception that the charter is not set out, and it does not appear whether the livery was mentioned therein or not.

The next objection is, that it does not appear that the defendant was a freeman of the city of London. In *The Innholders' Society v. Gledhill* two of the Judges (*Foster and Wilmot, Js.*) held, that it ought to have been alleged in the declaration, that the defendant was a freeman of the city of London. And in the case of *The Poulterers' Company v. Phillips, Tindal, C. J.*, in delivering the judgment of the Court, says (a), "It was agreed by both the learned counsel who argued the case, that before a person can be admitted a liveryman of any of the companies, he must be a freeman of the city of London; and as the incorporation of this company extends to and includes all persons from time to time using the trade of poulterers within the city of London and liberties thereof, or within seven miles of the same city, it follows that there may be many of the freemen of the company who are not freemen of the city of London. If, therefore, this bye-law is to be construed strictly by the letter, and to be held to give the master, wardens, and assistants the power of calling into the livery

(a) 6 Bing. N. C. 322.

of the company *all* such persons, being freemen of the company, as they should think fit, it would extend to such persons who, by the law and custom of the city, could not be of the livery of the company, by reason of their not being free of the city; and, consequently, such bye-law must be held to be void, upon the authority of the opinions of *Foster, J.*, and *Wilmot, J.*, on this same precise point, taken in the *Innholders' Society v. Gledhill*."

1845.
PIPER
v.
CHAPPELL.

Another objection is, that the bye-law itself is bad. But, first, the breach of it alleged in the declaration is insufficient, as it does not shew that the defendant has rendered himself liable to the penalty. It merely alleges that "he did not nor would propose himself to serve the said place, and did not nor would attend or serve the place aforesaid at the then next meeting;" but the mere *non-attendance* does not render him liable to the penalty, for no penalty is given by the bye-law for non-attendance at the next meeting. The Court cannot say that mere non-attendance at the meeting is equivalent to a refusal to serve. He might have been ill, or otherwise prevented from attending. It cannot be equivalent to an allegation that he refused the office; and it is necessary for the plaintiffs, in a case of this sort, to bring the party strictly within the penalty imposed. It is indeed afterwards added—"or at any subsequent meeting;" but then the declaration does not aver that the defendant had notice of any subsequent meeting.

Then the bye-law is bad, for uncertainty as to the amount of the penalty. It says, that every person refusing the office shall forfeit and pay the sum of £5, "or less, at the discretion of the master and wardens for the time being, so it be not under 40s." But a penalty of this nature must be a certain definite sum; and it is contrary to the law, and to the charter, to leave it to the discretion of others as to what the amount shall be: *Wood v. Searl* (a).

(a) Bridgman Rep. 139.

1845.
 {
 PIPER
 v.
 CHAPPELL.

In that case the penalty was—"under pain of forfeiting to the master and wardens for the time being, for every offence, such sum (not exceeding 40s.) as shall be assessed by the master, wardens, and assistants, or the greater part of them;" and it was held ill, because no certain penalty was set down, but left to the discretion of the society, which is stated to be against the course of all laws; for when a law is made, it is necessary that the penalty thereof should be known, to the end men might not offend." [*Pollock*, C. B. —There the ambiguity was between 40s. and nothing; here it is between 40s. and £5. I rather think they do appear by the declaration to have exercised their discretion that the penalty shall be £5. The bye-law alleges that the penalty is be "£5, or less, at the pleasure and discretion of the master and wardens for the time being, so it be not under 40s.;" and I observe the declaration alleges, that it was adjudged by the Court that the defendant should pay the sum of £5. How does it appear that they did not exercise their discretion as to the amount of the penalty?] That falls under another head of objection. They do not appear here to have exercised any judgment at all, so that, even if the bye-law be good, they have not pursued it.

The next objection is, that the master and wardens have not power to sue for this penalty. It is not necessary now to argue whether it is competent to a corporate body to order the penalty to be paid to one of their body, and to sue for the penalty to the use of the corporate body at large; assuming that to be so, here is a charter limiting the manner in which the bye-law is to be made, and therefore the common-law power is taken away. Here the charter does direct who shall have the fines, for it provides, "that the same master, wardens, and commonalty of the freemen of the mystery of plumbing for the time being, or six of them at least, (of whom, &c.), should and might be able to levy the same fines and amerciaments, to the use of the aforesaid master, wardens, and commonalty of the art or

mystery aforesaid and their successors," so that there is a direction that the fines should be levied, not by one or two, but by the whole body to the use of the whole body. But the bye-law gives the power of levying to the master and wardens for the time being alone, and so is void; or if not, then it gives it to the whole body; and then these plaintiffs, being the master and wardens only, cannot sue. The penalty is then to be paid to such uses as aforesaid; that is, to the use, maintenance, and relief of the company, and to the officers of the company. But a corporation has no power to give a benefit to strangers; *Graves v. Colby* (a); and, from aught that appears here, the whole sum might go to the officers not being members of the corporate body.

Another objection is, that it does not appear that the Court sat at the time of this order being made.

Bovill, contra.—The declaration is good. It has been assumed on the other side that the Court take notice of facts not before the Court; and one thing has been entirely overlooked, namely, that the company is stated in the charter of James the First to have been "an *ancient* company," and the charter refers to the liveryman as a person then known. It begins by reciting, "that at the humble petition of his beloved subjects, the freemen of the company of the plumbers of London, which said company was and for a long time had been an *ancient company*," &c. And in speaking of the filling up of vacancies in the offices of master or wardens during the year, on death &c., "that it should be lawful for such and so many of the same master and wardens of the mystery aforesaid for the time being, and such persons as should have been masters or wardens of the mystery aforesaid, and at that time living, and such person or persons *of the livery* of the mystery aforesaid for the time being as should be present, or the major part of the same, &c., to elect another or

1845.
PIPER
v.
CHAPPELL.

(a) 9 Ad. & Ell. 356; 1 P. & D. 235.

1845.
 PIPER
 v.
 CHAPPELL.

other persons to the office of master or wardens, to execute those offices for the remainder of the year." The declaration then goes on, at the conclusion of the charter, to aver, that it was accepted by the freemen of the company, and that, by virtue of the letters patent and of such acceptance, the said freemen of the company of plumbers became and were a body corporate; and it then alleges, that they proceeded to make bye-laws, one of which was, that when any person should be made free of the company, he should take an oath to obey them; and it shews, that, after this bye-law was made, the defendant became and was and still is a freeman of the company, and that he had taken the oath required of him in that behalf. And the question first arises, whether, after he has so become a member of the company, and taken the oath of office, it is competent to the defendant to raise such an objection as that the company had no power to make and enforce the bye-law in question.

This doctrine is not new; it is noticed in the case of *The London Tobacco-pipe-makers v. Woodroffe* (a), where it is said, that "though the charter be inadequate to bind all the tobacco-pipe-makers in the kingdom, it may be and is competent to bind such of them as think fit to become members of the company." That shews that the Courts have considered a party who becomes a member of such a company estopped from making objections of this nature. The same doctrine is laid down in *King v. Clerk* (b), where it was resolved, that the Court of King's Bench takes notice of a liveryman, and the nature of his office, and that "he who comes into a company agrees to incident charges and duties." *The Innholders' Society v. Gledhill* (c) has been cited as in point for the defendant, but it is not mentioned in the case that liverymen existed in that company. Besides which, that decision has been virtually

(a) 7 B. & Cr. 852.

(b) 1 Salk. 349.

(c) Sayer, 274.

overruled by that of *The Vintners' Company v. Passey* (a). The next objection here is, that it does not appear that the defendant was a freeman of the city of London. It may be, however, that the court of aldermen have the power to make him a freeman of the city ; and besides, how is the Court to know that this is necessary, unless it be certified to them in due form by the Recorder? That is the only mode by which the Courts can regularly be informed of the customs of the city of London. The case of *The Poulters' Company v. Phillips* (b) has been relied upon ; but there the Chief Justice only says, "it has been agreed by both the learned counsel, that before a person can be admitted to be a liveryman of any of the companies, he must be a freeman of the city of London." That only shews that the counsel thought it necessary, not that the Court decided it to be so. The case of *The Vintners' Company v. Passey* is a distinct authority that the right to have a livery may be founded either on charter or custom.

1845.
 PIPER
 v.
 CHAPPELL.

Then the next objection is, that no sufficient breach of the bye-law is assigned. The bye-law provides, that every person that shall be called or chosen into the livery or clothing, shall, *immediately* upon notice or knowledge thereof given by the master and wardens, or any of them, or by their beadle or other officer for the time being, prepare himself to serve the same place at the *then next meeting* of the master and wardens ; and it provides, that every person so chosen to the livery, and accepting the same, shall, at the next meeting, pay such fees as formerly had been paid in like cases. And the declaration states, that the defendant became a freeman of the company, and that he had taken the oath required ; and that he was duly elected and chosen into the livery or clothing of the company, of which he had due notice and knowledge according to the statutes or ordinances, and was then, by notice

(a) 1 Burr. 235.

(b) 6 Bing. N. C. 314 ; 8 Scott. 593.

1845.
 PIPER
 v.
 CHAPPELL.

in writing, required to prepare himself to serve the place to which he had been so called and chosen, *at the next meeting* of the master and wardens, and that in default thereof he would be fined. It then states, that, although he was often afterwards requested so to do, and although a reasonable time had elapsed, the defendant did not nor would prepare himself to serve the said place, and did not nor would attend or serve the place at the then next meeting, or at any subsequent meeting of the master and wardens; and the defendant therein made default, and then wholly neglected and refused, and hath always hitherto neglected and refused, to prepare himself to serve the same place." The bye-law therefore provides that he is to prepare himself to serve *at the next meeting*; the obligation to serve is immediate; the moment he has notice of his election he is to prepare himself, and in case he refuses, he is to forfeit and pay to the master and wardens, for every such default, the sum of £5. [*Pollock*, C. B.—What is a default?] A refusal to prepare himself to serve. [*Pollock*, C. B.—Where does the bye-law shew any fine for refusing to prepare himself to serve the office? There is a wide distinction between the default of a person who has accepted the office, and of one who has not accepted it. A man who has accepted an office knows that he is to perform the duties of it.] We are here dealing with a party who is a member of the company, and who knows what he is to do upon being elected to an office. He knows he is to prepare himself to come to the next meeting. [*Alderson*, B.—There are two matters which he is to do; he is to prepare himself to serve the place, and if he accepts it, he is to pay the usual fees. And then it says, as to the penalty, "and which of them soever, so called and chosen into the same livery or clothing, refuseth to pay the said fees or duties, or any of them, or what person or persons called and chosen to be of or in the same livery or clothing, and refuseth the same, shall forfeit and

pay to the same master and wardens for the time being, for every such default, to such uses as aforesaid, the sum of £5." That is, either for not paying the fees, or for not preparing himself to serve.] He is required to do something immediately on receiving the notice, viz., to prepare himself to serve, and that at the next meeting. The penalty is for the non-performance of that which is enjoined before, viz., the preparing himself to serve. The only duty imposed is, the preparing himself to serve at the next meeting, and there is no provision that he shall actually accept the office.

Next, as to the validity of the bye-law. The authority cited, of *Wood v. Searl*, is in truth no more than the argument of counsel. The other objection there taken was clearly a good one, and it does not appear on what ground the judgment proceeded. In the case of *The Master and Company of Framework-knitters v. Green (a)* there was a similar bye-law, imposing a penalty of £10, "or such less sum as the master and wardens should judge fitting," and no objection was taken to it on this ground. All that the Court have to consider is, whether it be *reasonable*: Com. Dig., Bye-law, (B. 1); and surely it is so, when looked at with reference to the course of legislation in modern acts of Parliament, in which penalties limited as to their maximum, but variable below that amount at the discretion of justices and others, are constantly imposed. This is no more than a penalty of £5 with a power of mitigation, which is in no respect unreasonable. Nothing can be more uncertain in amount than the price of a dinner; yet a bye-law that a person elected to an office shall give a dinner, if it be for the benefit of the corporation, is good: *Scriveners' Company v. Brooking (b)*; Com. Dig., Bye-law, (B. 4).

With respect to the objection, that the penalty is re-

1845.
PIPER
v.
CHAFFELL.

(a) *Ld. Raym.* 113.

(b) 2 G. & D. 419; 3 Q. B. 95.

1845.
 PIPER
 v.
 CHAPPELL.

served to the use of the corporation generally, and cannot be sued for by the master and wardens, it is impossible, after the judgment of the Court of Queen's Bench in *Graves v. Colby* (a), that that objection can be sustained. [*Parke*, B., referred also to *Wood v. The Mayor and Commonalty of London* (b): and *Lush* thereupon abandoned this objection.]

Lastly, the adjudication of the penalty is sufficient. The discretion, for aught that appears, is exercised by inflicting the highest amount; although it is not necessary to shew that, for the imposition of the penalty mentioned in the bye-law is in itself sufficient, and binds the defendant to the payment of the whole sum. If the penalty was reduced by the discretion of the company, it is for the defendant to shew that. [*Pollock*, C. B.—It is not that the party offending shall pay such sum, between 40s. and £5, as they in their discretion shall think fit; but that he shall pay £5, or less, if the master and wardens in their discretion shall think fit.] Yes, and *primâ facie*, therefore, the penalty is the whole £5.

Lush, in reply.—As to the first point, the case of *The Innholders' Society v. Gledhill*, which was the deliberate judgment of the full Court, on general demurrer, is a direct authority for the defendant, and is not shaken by any subsequent decision. It was not denied to be law in *The Vintners' Company v. Passey*, and it was expressly recognised in *The Poulterns' Company v. Phillips*. The mention of a livery in the charter is not equivalent to an averment that the company has a livery. [*Pollock*, C. B.—Why should there be an averment that there is a livery, when the defendant himself has sworn to obey the bye-laws, which mention the existence of a livery?] His oath is only to observe such bye-laws as are valid and reason-

(a) 9 Ad. & Ell. 356; 1 P. & D. 235.

(b) 1 Salk. 390.

able. [*Pollock*, C. B.—For the purpose of this branch of the argument, we suppose the bye-law valid.] If it be a livery, but without any corporate character or privilege, then the bye-law is bad, as imposing a charge without any benefit. [*Pollock*, C. B.—It may be inferred, from the report of *The Innholders' Society v. Gledhill*, that the Recorder had at some previous time certified that a freeman must be also a liveryman.] That that is so appears also from a public statute, 11 Geo. 1, c. 18, which is still in force for all purposes, except as to the election of members of Parliament, and of which the Court will take notice.

Secondly, as to the breach. There is no allegation here that the defendant refused to accept the office. The bye-law provides for two contingencies only,—acceptance, or refusal to accept. The first part of it describes the duties of the liveryman on *acceptance* of the office; and there is no penalty imposed upon one who, *having accepted it*, neglects to prepare himself for the next meeting: it is assumed that he will do so. Then comes the penal part of the bye-law, that “which of them soever, so called and chosen into the said livery, refuseth to pay the said fees and duties; or what person or persons, so called and chosen to be of or in the same livery, *and refuseth the same*, shall forfeit and pay,” &c. It is said on the other side, that the words “and refuseth the same” apply to the refusal to prepare himself to serve at the next meeting; if so, there is no penalty at all on the refusal to take upon himself the office altogether, which is the main object of the bye-law. But, at all events, the “preparing himself” implies a *previous acceptance* of the office; and it is not averred here that the defendant did accept it, nor that he *refused* to accept it, and so became liable to the penalty. That part of the penalty which is imposed on the non-payment of the *fees* may well include a penalty for not coming to serve at the meeting, because the staying away would be a virtual refusal to pay the fees.

1845.
PIPER
v.
CHAPPELL.

1845.
 {
 PIPER
 v.
 CHAPPELL.

Lastly, as to the adjudication. The whole court, not the master and wardens only, exercise the discretion in adjudicating; whereas the master and wardens alone afterwards assess the penalty. That is not in conformity with the charter. [*Parke, B.*—The bye-law does not require any adjudication of the whole court; that averment, therefore, is surplusage.] Then the master and wardens should shew that they exercised a *discretion* upon the matter, not merely *will and pleasure*.

Cur. adv. vult.

The judgment of the Court was now pronounced by

PARKE, B.—This case was argued in Easter Term last, before my Lord Chief Baron, and my Brothers *Alderson* and *Rolfe*, and myself. The questions arose on a demurrer to a declaration in debt, on a bye-law of the Plumbers' Company.

The bye-law provides, that the master and wardens, &c. may call, choose, elect, and admit into the livery or clothing of the company such person free of the art or mystery of plumbing, as they should think fit, meet, and able; and that every person so called should, immediately upon notice thereof given by the master and wardens, or any of them, or by their beadle or other officer, prepare himself to serve the same place at the next meeting of the master and wardens, in such seemly and decent manner as formerly had been used; and that every person so called or chosen into the same livery or clothing, and accepting the same upon him, should use, wear, and keep the same livery or clothing, according to the usage amongst the same fellowship, and according to warning given him for that purpose; and further, that the same person so called and chosen into the said livery, and accepting the same, should bring in and pay at the next meeting, unto the master and wardens, to the use, maintenance, and relief of

the company, and to the officers of the company for entering the same into their books of remembrance, and for the warning given, such fees and duties as formerly in the said company had been paid in like cases: and which of them soever, so called and chosen into the same livery, refuseth to pay the said fees or duties, or any of them, or what person or persons so called and chosen to be of or in the same livery, and refuseth the same, shall forfeit and pay to the same master and wardens for the time being, for every such default, to such uses as aforesaid, the sum of £5, or less at the pleasure and discretion of the master and wardens, so it be not less than 40s.

And the declaration avers, that the defendant was a freeman of the art and mystery, and of the company, (but not of the city of London), and was duly elected; and assigns, as a breach of the bye-law, that the defendant, although often requested, and although a reasonable time had elapsed, and although the defendant was and continued such freeman, did not nor would prepare himself to serve the said place to which he had been so duly chosen and elected; and did not nor would attend or serve the said place at the next meeting, or at any subsequent meeting of the master and wardens of the said corporation; and the defendant therein made default, and refused to prepare himself to serve the same place.

The declaration then states, that the defendant was adjudged to be fined £5, the master and wardens having declared it to be their will and pleasure that that sum should be paid; and then states the non-payment thereof by the defendant.

On the part of the defendant, several objections were taken: 1st, That the bye-law was bad, because it did not appear that the Plumbers' Company was a company that had a livery.

2nd, That it was bad, because the penalty was not certain but arbitrary.

1845.
PIPER
v.
CHAPPELL.

1845.
 PIPER
 v.
 CHAPPELL.

3rd, That the defendant was not admissible into the livery, because none but freemen of the city were admissible, and there was no averment that the defendant was a freeman of the city.

4th, That the breach was defectively assigned, inasmuch as there was no proper averment that the defendant had refused so as to be liable to the penalty.

We think that none of the objections ought to prevail.

The first was grounded on the authority of the case of *The Innholders' Society v. Gledhill* (a), in which the Court held, that, as it was not alleged that the company had a livery, the Court could not notice it. For the plaintiff it was said, that this case had been overruled in that of *The Vintners' Company v. Passey* (b); but this statement is not correct. The point was mentioned in that case by the defendant's counsel, and that of *The Innholders' Society v. Gledhill* was cited; but there the defendant's own plea admitted the fact that the company was entitled to a livery, and he therefore could not take the objection. But we think that the present case is distinguishable; because, by the charter set out in the declaration, the king evidently contemplated that there should be a livery in the company for some purposes, and persons wearing it; because he directs that the persons of the livery of the company should have a voice in the election of warden. And we cannot construe the bye-law to be unreasonable, and illegal and void, which is to carry into effect the charter, and to secure the completion of the body which the Crown intends to exist.

The second objection was, that the penalty was arbitrary, whereas it ought to be certain, not varying at the will and pleasure of the persons who were to receive it.

The only case which we have been able to find bearing on this question, is that cited on the argument for the

(a) Sayer, 274.

(b) 1 Ld. Kenyon Rep. 500; 1 Burr. 235.

plaintiff, viz. *Wood v. Searl* (a), in which the penalty was such sum as the master, wardens, &c., should assess, not exceeding 40s.; but this case is no authority either way, for the bye-law was held to be bad, and it might have been so held upon other objections, or upon this. In the absence of any other authority to the contrary, we do not see any objection to this mode of fixing the penalty. It is a certain penalty of £5, with a power of mitigation not below £2; and we do not think this is unreasonable. We therefore think the second objection ought not to prevail. The third is, that there is no averment that the defendant was a freeman of the city; and it is said to be recognised law, that no one can be admitted of the livery of a company who is not free of the city. It has been held, that the Court of King's Bench will take notice of the nature of a liveryman's office; *King v. Clerk* (b); and Mr. Justice Denison appears to have acted upon that authority in the case in Sayer, 275, in giving his opinion that the declaration ought to have contained the averment that the defendant was a freeman of the city. In the case of *The Wardens of the Company of Leather-sellers v. Beacon* (c), the custom of the city was pleaded, that one must be a freeman of the city to be admitted to the livery of the company, and the traverse of the custom concluded with a verification; and rightly, because the Court said the custom must be proved by the Recorder ore tenus; and it is not improbable that, between the date of that case, in which the Court did not take notice of the custom (33 Car. 2), and that in Salkeld (8 W. 8), in which it did, the custom was so certified to the King's Bench; and where once there has been a certificate by the Recorder to a Court, that Court always afterwards takes notice of the custom: per Lord Mansfield in *Blacquiere v. Hawkins* (d). But there is no authority that one Court can

1845.
PIPER
v.
CHAPPELL.

(a) Bridgm. 139.

(b) 1 Salk. 349.

(c) T. Jones, 149.

(d) Doug. 380.

1845.
 PIPER
 v.
 CHAPPELL.

take notice of such a record in another. The Court of Common Pleas, it is true, having heard the admission of the custom from the counsel on both sides, adopted it; but it did not in any way affect the propriety of the judgment, which was quite correct, whether such was the custom or not: *Poulterers' Company v. Phillips* (a). This case, therefore, is no authority upon this point. We think, therefore, that this objection ought not to prevail; first, because we are not called upon to presume that the livery mentioned in the charter is a livery entitling to vote on city elections, with its incidents;—it is enough that it is *prima facie* legal for some purposes: and secondly, because, if this term “livery” means a city livery, this Court cannot take notice of the custom of the city with respect to livery, for it does not appear that it had ever been certified to this Court in the mode in which the city charters direct that it should; viz. ore tenus by the Recorder.

The last objection is as to the form of the breach. We are satisfied that one refusal to which the penalty is attached, is the refusal to prepare to serve, and to serve at the next court: and consequently the breach is well assigned.

Therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

(a) 6 Bing. 321.

IN THE EXCHEQUER CHAMBER.

(*In Error on a Bill of Exceptions from the Court of Exchequer*).

ORMROD v. HUTH and Others.

1845.

June 18 & 19.

CASE for a false representation. The declaration stated, that the plaintiff, to wit, on &c., at the request of the defendants, bargained with the defendants to buy of them divers, to wit, 142 bales of cotton of them the defendants, and for a certain price, to wit, the price or sum of 1646*l.* 15*s.*; and the defendants then, during such bargaining, falsely, fraudulently, and deceitfully exhibited to the plaintiff divers, to wit, 142 parcels of cotton, and falsely, fraudulently, and deceitfully represented and held out to the plaintiff, and induced the plaintiff to believe, that the same parcels were samples of the said cotton so bargained for, and were fair samples thereof, and that the said cotton was equal to and of the same description with, and of equal and like quality with the said parcels so exhibited as aforesaid; and thereupon the plaintiff, heretofore, to wit, on the same day and year, confiding in and relying upon the said parcels so exhibited, and the said representations and inducements of the defendants so made as aforesaid, at the request of the defendants, was induced to buy and did buy the said cotton of the defendants, at and for the said large price or sum of, to wit, 1646*l.* 15*s.*, and afterwards, to wit, on the same day and year, paid to the defendants the same sum of

Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller:—*Held*, that an action on the case for a false and fraudulent representation was not maintainable, without shewing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it.

1845.
ORMEROD
v.
HUTH.

money for the same ; whereas, in truth and in fact, at the times of the said bargaining and sale by the defendants, the said parcels of cotton were not fair samples, nor were they samples of the said cotton so bargained for, nor was the said cotton equal to and of the same description with, and of equal and like quality with the said parcels, but of inferior and much worse description and quality, and of much less value. And the plaintiff in fact says, that the defendants, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff in the sale of the said cotton as aforesaid, by means whereof &c.

Pleas, first, not guilty ; secondly, that the plaintiff was not induced to buy, nor did he buy the said cotton or any part thereof, modo et formâ.

The replication took issue upon both pleas.

At the trial, before *Coltman*, J., at the Liverpool Spring Assizes, 1843, it appeared that the plaintiff, a cotton-spinner, had, through a broker, bought several bales of cotton from the defendants, who were merchants at Liverpool. The usual method of purchasing cotton is by brokers. The selling broker always has samples by which he sells. Inspection from the bulk is quite unusual in purchases of cotton. The samples are drawn from a slit in the bale ; and if any part of the bale proves to be of an inferior quality to that found at the slit, it is said to be falsely packed, and is unmerchantable on that account. It is usual for the buying broker to have samples drawn by his own people from the bale, which redrawn samples he compares with those by which he has bought. In the present case, forty-five of the bales which were purchased by the plaintiff were found to be falsely packed. Cotton is packed in layers, so that the edges are visible only at the top and bottom, and along the narrow side. From the way in which the cotton is packed, you can only take the sample from the long narrow side. In this case there were two, three, or more layers of

good cotton like the sample ; but in the inner part the cotton was bad : in some instances there was not more than one layer of good, and the rest bad. A witness stated that this must have been done by design, and that the bales must have been falsely packed when purchased ; but there was no evidence to shew that the defendants were cognisant of the fraud. It was proved that the cotton had come straight from the ship to the defendants' warehouse, and they were the consignees ; but whether they were the consignees on their own account or for others did not appear. Upon this evidence, the defendants' counsel insisted that there was no case to go to the jury on which they could find for the plaintiff on the first issue, inasmuch as neither the defendants nor their brokers were proved to have had any knowledge of the alleged misrepresentation being false, or of the false packing, or to have acted in any respect against good faith or with any fraudulent purpose. The plaintiff's counsel, on the other hand, maintained, that the delivery of samples not corresponding with the bulk, was a false representation of the quality of the cotton, which must be considered in point of law as fraudulent, as being the statement of a fact which the party making it did not know to be true, and which in fact was not true, and which induced the buyer to make the purchase. The learned Judge directed the jury, that, unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with some fraudulent purpose, the defendants were entitled to the verdict on the first issue : whereupon the plaintiff's counsel excepted to the direction of the learned Judge, and insisted that proof of the defendants or their brokers being acquainted with the fraud that had been practised in the packing, or of their having acted against good faith, or with some fraudulent purpose, was not necessary to be given by him on that issue, and tendered

1845.
 ORMROD
 v.
 HUTH.

1845.
ORMROD
v.
HUTH.

a bill of exceptions accordingly. The jury found a verdict for the defendants on the first issue, and were discharged by consent as to the other issues.

A writ of error having been brought, the case was now argued by

Cowling, for the plaintiff in error.—The plaintiff is entitled to succeed on this issue, although he is not able to prove that the defendants acted fraudulently or with knowledge that the representation was untrue, if it turned out in fact to be untrue. The plaintiff was induced to purchase by the appearance of the samples, and by the understanding that the cotton in the bales corresponded with the samples; and if it does not correspond, he is entitled to succeed, although he is not able to bring home to the defendants a knowledge of the fraud. If, during a negotiation for a sale of goods, the vendor makes a representation, to induce the purchaser to complete the contract, of something which he does not know to be true, and which turns out to be false, a jury would be warranted in finding a verdict for the purchaser, although he cannot shew that the vendor knew it to be untrue. It is not necessary to say that they *must* find for the plaintiff; it is sufficient, in the present case, if they *might* have done so. If the vendor mis-states a fact, and by that mis-statement induces the purchaser to make the contract, he is liable for it, whether he knew it to be untrue or not. There is here every ingredient necessary to support an action. There is a wrong done, a damnum, and also an injuria; for the defendants have stated that which was not true, although they might not know it to be untrue. It is as much a legal fraud for a party to make a statement which he does not know to be true, as if he made a statement which he knew to be untrue, if it turns out to be so. In *Rex v. Mawbey (a)*, *Lawrence*,

(a) 6 T. R. 637.

J., says,—“Where a man swears to a particular fact, without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false, and equally indictable.” So here, the defendants are equally liable if they make a statement that the cotton in the bulk was the same as the sample, and it turns out to be otherwise, whether they knew it to be so or not. Policies of insurance are vitiated by any false representation, though made in ignorance of its being false: *Goram v. Sweeting* (a), *Carter v. Boehm* (b), *Hodgson v. Richardson* (c). The rule applicable to insurances applies equally to other contracts. The law looks not to the motives of actions, but to the general result of what the parties do. The case of libel is analogous. In *Chalmers v. Payne* (d), Lord Abinger, C. B., says, “Where a publication is injurious on the face of it, it is a wrong from which malice will be inferred, and which makes it actionable, whether any injury was intended or not. That is a principle which is not confined to libel only, but is a general principle applicable to other cases.” The same doctrine is laid down in nearly the same words in *Fisher v. Clement* (e). There is, however, a motive in the vendor of goods, to induce the vendee to complete the contract; and if a party is influenced by a statement of the vendor to complete a contract, and that statement turns out to be false or untrue, he is liable. It is no answer to say, that it cannot be shewn that the party had an improper motive; it is sufficient that such a motive might exist, if the result to the plaintiff be the same. It may be, and generally is, impossible to prove actual knowledge. In *Pawson v. Watson* (f), Lord Mansfield, C. J., says, “It is equally false for a man to undertake to say that which he knows nothing at all of, as to say *that* is true which he knows is not true.” So here, it

1845.
 ORMEROD
 v.
 HUTH.

(a) 2 Saund. 200 b, note 1,
 where the cases are collected.
 (b) 3 Burr. 1905.
 (c) 1 W. Black. 463.

(d) 2 C., M., & R. 157.
 (e) 10 B. & Cr. 472.
 (f) 2 Cowp. 788.

1845.
ORMROD
v.
HUTH.

is not necessary to shew that the party knew the statement to be false—it is enough to shew that it *is* false, and leave him to explain how he came to make the statement. In *Cooper v. Gardener* (a), which was case for falsely affirming that the goods were his own when they were the goods of another, it was held that the declaration was good, without saying *sciens* they were the goods of another. That was case where there was no fraud, and where the party did not know that he was making a false statement; and yet it was held that the action lay. *Grose, J.*, appears to have had this case in his mind, in delivering his judgment in *Pasky v. Freeman* (b). In *Schneider v. Heath* (c), *Sir James Mansfield, C. J.*, says, “It signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false.” And in *Smout v. Ilbery* (d), *Alderson, B.*, in delivering the judgment of the Court, says, “It is a wrong to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces an injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.” [He also cited *Adamson v. Jarvis* (e), *Burrowes v. Lock* (f), *Fuller v. Wilson* (g), *Cornfoot v. Fowke* (h), *Collins v. Evans* (i), *Railton v. Matthews* (k).] In *Moens v. Heyworth* (l), *Lord*

(a) Carth. 90.

(b) 3 T. R. 54.

(c) 3 Camp. 508.

(d) 10 M. & W. 9, 10.

(e) 4 Bing. 66.

(f) 10 Ves. 470.

(g) 3 Q. B. 58.

(h) 6 M. & W. 358.

(i) 13 Law J. Rep. Q. B. 180.

(k) 10 Cl. & Fin. 934.

(l) 10 M. & W. 155.

Abinger, C. B., says, "The fraud, which vitiates a contract and gives the party a right to recover, does not in all cases necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true."

Parke, B., undoubtedly says (a), "To give a right of action for that representation, it was, I think, essential to prove, that, by words or acts of the defendants or their agents, it was made falsely, and for the improper purpose of inducing the plaintiffs to purchase the goods ;" but the most that can be said of that is, that it is the opinion of one judge against another, to shew that a bare affirmation, without a warranty, is no cause of action. [*Tindal*, C. J., referred to *Chandelor v. Lopus* (b).] In a note upon that case, in *Selw. Nisi Prius*, 648 (c), Mr. Selwyn appears to have thought that the affirmation there mentioned was made long prior to the contract, and was not connected with it. And in that case *Anderson*, J., was of the contrary opinion, and held that the deceit in selling the stone for a bezoar stone, when it was not, was a cause of action.

1845.
ORMROD
v.
HUTH.

Crompton, for the defendant in error.—In all cases of the sale of chattels, the rule of *caveat emptor* applies, so far as relates to the condition or quality of the goods, except there be a warranty, or fraud in the seller. And there is no distinction between legal and moral fraud in cases of this kind. In *Chandelor v. Lopus*, the defendant sold to the plaintiff a stone, which he affirmed to be a bezoar stone, when it was not; and it was held that the bare affirmation that it was a bezoar stone, without warranting it to be so, was no cause of action. It is also there said, that "although he knew it to be no bezoar stone, it is not material." That, as Mr. Smith observes,

(a) 10 M. & W. 157.

(b) Cro. Jac. 4.

(c) 9th Ed.

1845.
 ORMEROD
 v.
 HUTH.

in his Leading Cases (a), has often been denied; but it was not necessary to the decision of the case, the main doctrine of which has never been disputed. The main decision there was, that the plaintiff must either declare upon a contract, or, if he declare in tort for a misrepresentation, he must aver a scienter. In *Budd v. Fairmanor* (b), *Tindal*, C. J., points out the distinction between a warranty and a representation. He says, "Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to shew that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the scienter, and shew that the description was false within the knowledge of the seller." And after stating that, in *Parkinson v. Lee* (c), upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect unknown to him, but arising from the fraud of the grower from whom he purchased; he adds, "A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty." The present is simply the case of a representation, and therefore an action is not maintainable without a scienter. The case of *Meyer v. Everth* (d) turned entirely on its being a deceitful representation, and was not a sale by sample. In *Freeman v. Baker* (e), *Parke*, J., says, "The question of deceit was disposed of by the jury, when they found that the defect in the ship was unknown to the defendants. *Polhill v. Walter* (f) only decides, that if a person states what he knows to be untrue, and induces

(a) P. 77.
 (b) 8 Bing. 52.
 (c) 2 East, 313.

(d) 4 Camp. 22.
 (e) 5 B. & Ad. 797.
 (f) 3 B. & Ad. 114.

another to act upon it to his prejudice, a fraud in law is committed." And *Patteson*, J., says, "The decision in *Polhill v. Walter* is put distinctly and pointedly on the ground, that the party knew the representation he made to be false;" and Lord *Tenterden* particularly guards against any other construction, by saying, "If the defendant had had good reason to believe his representation to be true, *he would have incurred no liability*; for he would have made no statement which he knew to be false: a case very different from the present." *Dobell v. Stevens* (a) and *Lysney v. Selby* (b) also shew that knowledge of the fraud is a necessary ingredient in an action for a false representation. *Springwell v. Allen* (c), again, shews that the scienter or fraud is the gist of the action, where there is no warranty; and that case was cited as law by *Littledale*, J., in *Early v. Garrett* (d). *Williamson v. Allison* (e), where it was held that the scienter need not be proved, was a case of express warranty; but that case also shews that, in cases of mere misrepresentation, the allegation of a scienter must be made and proved. Where there is a sale by sample, and there is no warranty or fraud, the seller is not liable for an unknown defect in the goods sold: *Parkinson v. Lee* (f), *Southern v. Howe* (g), *Pasley v. Freeman* (h), *Jendwine v. Slade* (i), *Cornfoot v. Fowke*, per *Rolfe*, B.: Com. Dig., "Action on the Case," (A. 8, 11), (E. 4). The opinion of a majority of the Judges of the Court of Exchequer, in *Moens v. Heyworth*, is in favour of the view contended for by the defendant. The opinion of Lord *Abinger*, C. B., seems to have been formed from his considering this case as governed by the same rule applicable to cases of policies of insurance, which have always been considered as con-

1845.
ORMROD
v.
HUTH.

(a) 3 B. & Cr. 623.

(b) 2 Ld. Raym. 1118.

(c) 2 East, 448 n.; Aleyn, 91.

(d) 9 B. & Cr. 932.

(e) 2 East, 446.

(f) 2 East, 313.

(g) 2 Roll. Rep. 5.

(h) 3 T. R. 51.

(i) 2 Esp. 572.

1845.
 OARMROD
 v.
 HUTCH.

tracts uberrimæ fidei. There is, however, a distinction between other representations and representations of this nature. *Fuller v. Wilson* is not the case of a representation as to the condition of goods sold. *Collins v. Evans* was the case of a mandatam, and the defendant was held not liable in the absence of knowledge or fraud: it is therefore a strong authority in favour of the defendants. In *Taylor v. Ashton* (a), Parke, B., said, in the course of the argument, "I adhere to the doctrine, that an action for deceit will not lie without moral fraud; and Lord Denman, in the case last cited (*Fuller v. Wilson*), seems to admit that to be so. If the party bonâ fide believes the representation he made to be true, though he may not *know* it, it is not actionable." And, in delivering the judgment of the Court, the same learned Judge says (b), "It was contended by Mr. Knowles that it was not necessary moral fraud should be committed, in order to render these persons liable; for that if they made statements for their own benefit, which were calculated to induce another to take a particular step, and if he did take that step to his prejudice in consequence of such statements, and such statements were false, the defendants were responsible, though they had not been guilty of any moral fraud. . . . From this proposition we entirely dissent; because we are of opinion, that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be *fraudulently made*." The argument on the other side would go to the extent of abolishing altogether the use of the scienter in pleading; for if it be well founded, there could be no case in which a scienter would be necessary. *Smout v. Ilbery* was not a case of sale, but of agency, and is founded upon a doctrine first promulgated in some cases in the American courts. *Alderson*, B., was a party to all those judgments which have been cited from the Exchequer; and he never

(a) 11 M. & W. 413.

(b) P. 414.

supposed that in *Smout v. Ilbery* he was altering the law he had before declared. The law has said, that if a party means to protect himself from hidden defects, he must take a warranty, and he is not protected otherwise, unless he can make out fraud. There is no hardship in supporting the ruling of the learned Judge, since a vendee may always protect himself by requiring a warranty. The direction of the learned Judge, therefore, was perfectly correct, and was the only ruling he could properly have given.

1845.
 ORMEROD
 v.
 HUTH.

Cowling, in reply.—A distinction has been endeavoured to be drawn as to mandatories, and some such distinction has no doubt been taken by Mr. Justice Story; but his remarks on this subject were not meant to be universal, that it was in no case necessary to shew actual knowledge of the falsehood of the assertion. [He referred to Story's Equity Jurisprudence, ss. 193, 195 et seq., where the authorities are collected.] The question, according to the argument on the other side, only comes to this—what is fraud? There is no doubt as to the rule of caveat emptor; but if a party is misled by the statement of the vendor, and thrown off his guard by it, that rule ceases to be applicable. The question comes back to what is recognised as fraud in law. No doubt, if a purchaser can prove *actual* fraud in the sale, it is then quite clear that the vendor is liable. It is not meant to be said that every statement that a vendor makes, and which turns out to be wrong, is necessarily actionable; but where a statement is made which is material to the contract, and it turns out to be untrue, and the vendee is inevitably misled by it, the vendor is liable for it. If the result to the person injured is the same, the law considers it the same as if the motive had been fraudulent. The tendency of actions alone is material; for instance, a man is liable in trespass for an involuntary damage to another. It is not contended that in all cases a scienter is superfluous,

1845.
 ORMEROD
 v.
 HUTH.

but only that in cases of contract, where there ought to be perfect fair dealing between the parties, it is unnecessary. Wherever there is neither a representation nor a warranty, there a scienter must be alleged and proved: Selwyn's *Nisi Prius*, p. 637. No answer has been given as to the inconvenience which it was urged would arise in adopting the test of actual knowledge, and the difficulty of proving it. All that the plaintiff below could be called upon to shew was, the existence of the misrepresentation of a material fact. [Coltman, J.—Mr. Crompton and you do not agree upon the meaning of “exhibiting the samples;” he says it only means that they are fairly drawn from the bulk, but you say the meaning must be that the bulk corresponded with the samples.] It must be taken upon the bill of exceptions that there was a misrepresentation, and the Judge assumes it to be so. [Maule, J.—The utmost that you can argue is, that it was a *prima facie* case of fraud, and therefore there was a point for the jury as to the fraud.] It is a *prima facie* case of legal, not of moral fraud. The proposition now advanced is consistent with all the authorities which have been cited. There is no reason why policies of insurance, to which this doctrine is admitted to apply, should be construed differently from other contracts. *Chandelor v. Lopus* is a case of little or no authority; and if it proves anything, it proves too much. It is impossible to say how much of it is law, and one part of it clearly is not. [Tindal, C. J.—It has been only overruled as to that part where it is said that knowledge was immaterial.] *Pasley v. Freeman*, and that class of cases, were not cases of dealing between the parties for the sale and purchase of goods; they are cases of agency, in which it is not disputed that a scienter and moral fraud must be proved. [Tindal, C. J.—It would be strange if there were not an analogy between cases of dealing and other cases of representation. The only difference is, that the one is stronger for the jury to find fraud in

than the other.] In *Budd v. Fairman*, the representation was of a trifling matter, which could not have influenced the party in making the contract. But where the representation is of a matter material to induce the party to purchase the goods, it is equivalent for this purpose to a warranty. *Freeman v. Baker* was the case of the sale of a ship *with all faults*, which would have the effect of putting the purchaser on his guard. In all such cases the rule of caveat emptor applies. In *Lysney v. Selby*, Lord Holt, although he uses the word *false*, does not say false to *his knowledge*; and *Powell, J.*, takes the same view; and they both say there was no fraud. In *Springwell v. Allen*, there was neither warranty nor representation. In *Williamson v. Allison*, there was an express warranty, and the scienter was not necessary. In *Taylor v. Ashton*, there was no dealing between the parties, and there the representation was made before, and not at, the time of the contract. Looking at all the cases together, the authorities are strong in favour of the plaintiff.

1845.
ORMROD
v.
HUTH.

The judgment of the Court was pronounced by

TINDAL, C. J.—We think the direction of the learned Judge was perfectly correct.

The action is brought for a false and fraudulent representation, alleged to have been made by the defendants, on the sale of certain cotton to the plaintiffs, that the cotton was of the same description, and of equal and like quality, with the sample by them exhibited, whereas in fact it was not: the action not being brought upon an express warranty, nor any express allegation being laid in the declaration, that the defendants knew at the time that the bulk of the cotton did not equal in description or quality the sample which had been so exhibited.

Upon the trial, the learned Judge directed the jury, that, unless they could infer that the defendants or their brokers

1845.
 ORMEROD
 v.
 HUTH.

were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith, or with some fraudulent purpose, the defendants were entitled to the verdict; and we think this the proper direction.

The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can shew that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of caveat emptor applies, and the representation itself does not furnish a ground of action. And although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found, on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller.

The rule we have drawn from the cases appears to us to be supported so clearly by the early, as well as the more recent decisions, that we think it unnecessary to bring them forward in review; but satisfy ourselves with saying, that the exception must be disallowed, and the judgment of the Court of Exchequer affirmed.

Judgment affirmed.

IN THE HOUSE OF LORDS.

(In Error from the Court of Exchequer Chamber).

HATFIELD v. PHILLIPS and Others.

1845.

July 1.

THE Court of Exchequer Chamber having held that the direction and charge of Lord Abinger, C. B., in this case, was correct, and affirmed the judgment of the Court of Exchequer (a), a writ of error to the House of Lords was brought by the plaintiff below (the defendant in the original suit), which was argued on the 16th and 21st of February, and the 24th and 30th of June last, by

Kelly, Wortley, and Sir J. Bayley, for the plaintiff in error (b). — The question in this case is, whether the plaintiffs, the consignors of a cargo of tobacco, by intrusting Warwick & Clagett with it for the purpose of sale, must not be taken to have intrusted them with the dock-warrants, and with all other documents which the possession of the bills of lading enabled them to obtain in the course of business. The consignors sent the goods to this country for the purpose of sale. [The *Lord Chancellor*

A., residing abroad, being the owner of goods, consigned them by a bill of lading, making them deliverable in London to the consignee or his assigns; and having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive and sell the goods. The factor received the goods, entered them in his own name at the Custom-house, and obtained, without the privity or express con-

sent of the owner, a dock-warrant in his own name, it being the usage at the docks to give such document to the person in whose name they are entered, and pledged such dock-warrant for advances beyond the charges for which the factor had a lien:—*Held*, that, under these circumstances, the factor was not intrusted with a dock-warrant, within the meaning of the stat. 6 Geo. 4, c. 94, s. 2.

A party intrusted with the bill of lading for the purpose of selling the goods mentioned in it, is not, in consequence of being so intrusted, to be considered as intrusted with the dock-warrant, notwithstanding that his possession of the bill of lading, and of the goods under it, enables him to obtain the dock-warrant.

(a) See 9 M. & W. 647.

and the arguments given more in

(b) See 12 Cl. & Fin. 343,

detail.

where the facts are fully stated,

1845.
 HATFIELD
 v.
 PHILLIPS.

lor.—Is not the question this: whether the delivery of the bill of lading is not evidence of an intrusting with the dock-warrants? It is rather more. The consignment being for the purpose of sale, and such sale only being to be effected by a dock-warrant or delivery order, the question is, whether the intrusting with the bill of lading was not an intrusting for the purpose of an absolute disposal of the goods. The earliest case on this subject is that of *Pater-son v. Tash* (a), which will be relied upon by the defendants. There it was held by *Lee*, C. J., that, though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. But it does not appear from that case, whether the goods had been consigned to the factor for sale or for pledge, or with what authority; and without knowing that, it is impossible to say whether the case has any application or not. And the decision in that case, which was undoubtedly followed by others, was considered so contrary to the usage of trade, and to commercial practice, that it met with great disapprobation in the mercantile world, and the Legislature at length altered the law by the 6 Geo. 4, c. 94; and, by the 2nd section of that act it was enacted, "That any person or persons intrusted with and in possession of any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or

(a) 2 Str. 1178.

corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents, or either of them." Now, a person who, by the act of the consignor, acquires an absolute power of disposing of the goods, and of the documents representing them, may surely be fairly said to be intrusted with the documents and the goods. To hold that the factor is not intrusted by the owner, would be to defeat the object of the statute, and to enable the owner of the goods, or the factor, or both, by colluding together, to commit frauds upon the persons whom the Legislature meant to protect. [*The Lord Chancellor*.—The factors had instructions to sell: could they do so without obtaining a dock-warrant or a delivery order?] No; they must have either the one or the other, according to the usual course of trade. [*The Lord Chancellor*.—You say, where a party gives general instructions to sell, he thereby authorizes the factor to do everything that is necessary for that purpose. Could the factor at once get the dock-warrant or the delivery order; and, if he did so, might he pledge it?] He might; and therefore this case is clearly within the statute. It was thereby intended that the lender of money on such security as this should not be bound to inquire whether a person who had possession of the goods, or the dock-warrants, was as against all the world entitled to the possession of them. [*The Lord Chancellor*.—You say the statute says to the owner of the goods, "If you *intrust* a person with them, you must take the consequences of it." But suppose the owner sends a bill of lading, with instructions to the factor not to sell the goods for six months; he would have authority to get the goods, but would not have the right to dispose of them. I do not

1845.
HATFIELD
v.
PHELPS.

1845.
 HATFIELD
 v.
 PHILLIPS.

think he is intrusted, merely because he has the power to do what the owners have ordered him not to do.] The authority to sell and the power to sell must not be confounded, at least where the interests of third parties are to be affected. The factors were here intrusted with the power, for, upon receipt of the bill of lading, they had absolute power over the goods. Third parties were not bound to inquire whether they were authorized to exercise that power. [*The Lord Chancellor*.—But, as is well argued by Mr. *Crompton*, in *Phillips v. Huth* (a), “A mere enabling is not an intrusting. Suppose I give a man the key of my bureau, in order to go and bring out of it particular papers, and he takes out of it other papers; can it be said that I intrust him with the latter, because, by giving him the key, I enabled him to obtain them?”] That is not quite applicable to the present case. Where a foreign consignor sends goods with a bill of lading and instructions to sell, there is an implied authority to do all that is necessary for that purpose, and the consignee must be considered as intrusted with the goods, because, without being so intrusted, he could not carry into effect the orders of his principal. The Legislature so considered it, and, for the protection of third parties, intended to put pledges of the symbols of goods on the same footing with pledges of the goods themselves; and whenever a factor is intrusted with the bill of lading, and with the symbols of the goods, he is equally intrusted with the goods themselves. The framers of the statute well knew that the goods themselves were never pledged, but only the instruments that were the symbols of them; and the statute, therefore, only uses words which indicate a dealing with the goods by means of the instruments which are the symbols of the goods. The very character of factor implies that he is intrusted with the goods: *Mace v. Cadell* (b), *Martin v. Coles* (c). Mr. Bell, in his Commentaries

(a) 6 M. & W. 587, 588. (b) Cowper, 232. (c) 1 M. & Selw. 140.

on the Laws of Scotland (a), shews that a factor is distinguished from a broker, by being intrusted with goods as if they were his own. [They also cited *Crawshay v. Thornton* (b), *Stodart v. Dunken* (c), *Hawes v. Watson* (d), and *Pickering v. Busk* (e).] If it be established that the goods themselves are intrusted to the factor, he has clearly the right to pledge the documents which represent them. And where the factor becomes entitled to the documents which represent the goods, and it becomes his duty to create those documents, it cannot be said that he is not intrusted with the documents themselves when he obtains them. So here, Warwick & Clagett must be considered as intrusted with the dock-warrants, which they were entitled and indeed bound to call into existence, for the very purpose of dealing with the goods in the manner directed by their principal. They were at least entitled to pledge the goods to the amount which they had advanced for freight and other charges, for which it is perfectly clear they had a lien; and they had therefore a legal right to a dock-warrant in respect of their lien on the goods.

The document and the creation of it being, therefore, lawful, the secret intention of the factor to abuse that legal right cannot, as to a third party, render his creation of that document unlawful.

Jervis, Crompton, and Waddington, for the defendants in error, were not called upon to address the House.

The LORD CHANCELLOR.—We have advised with the learned Judges upon this subject, and do not think it necessary to hear the counsel on the part of the defendants in error. Their Lordships are now, I believe, prepared to favour us with their view of the case. The question to be

(a) Vol. 1, pp. 195, 385.

(b) 2 Mylne & Cr. 1.

(c) 2 Camp. 344.

(d) 2 B. & Cr. 540.

(e) 15 East, 38.

1845.
HATFIELD
v.
PHILLIPS.

submitted to the Judges is in these terms :—" A., residing abroad, being the owner of goods, consigned them by a bill of lading, making them deliverable in London to the consignee or his assigns, and having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive and sell the goods. The factor receives the goods, enters them in his own name at the Custom-house, and obtains, without the privity or express consent of the owner, (by reason of the goods being entered in his own name at the Custom-house), a dock-warrant in his own name, it being the usage at the docks to give such document to the person in whose name they are entered, and pledges such dock-warrant for advances beyond the charges for which the factor has a lien. Is it a consequence of law, under these circumstances, that the factor was intrusted with the dock-warrant, within the meaning of the act of Parliament, 6 Geo. 4, c. 94, s. 2?"

TINDAL, C. J., delivered the opinion of the Judges.—I am requested by my Brethren to state our opinion upon the question now put by your Lordships to be, that, under the circumstances supposed by that question, it is not a consequence of law that the factor was intrusted with the dock-warrant, within the meaning of the act of Parliament, 6 Geo. 4, c. 94, s. 2; for we consider the proper interpretation of that section to require, that there should be not only a possession by the factor of the document upon which the advance is made, but an actual intrusting of him with such document by the owner of the goods, or a possession under such circumstances as that an actual intrusting may be inferred therefrom. We think the act intended, that, where the owner of the goods did not deliver or cause to be delivered to the factor the document in question, but, on the contrary, the factor obtained it for himself, it should appear that he obtained the possession of it under circumstances which shew the owner of the

goods intended him to have such possession, or that it should appear that the owner had the opportunity, if he had thought proper to exercise it, of giving notice to the world upon the face of the document, or otherwise, that he did intend to allow it be parted with in any other manner than for his own use. The statute enables the factor to pledge the goods to the extent of his own lien or interest, but he cannot give a greater interest than he has himself, except by the production of a document, and he cannot do that unless he is intrusted with that document by the owner. The circumstances supposed by your Lordships' question appear to us to furnish no other conclusion, than that the owner of the goods, by transmitting the bill of lading indorsed in blank to the factor, enabled him in the usual course to obtain the possession of the goods; but they furnish no conclusion of law in determining the question whether the factor was intrusted with the dock-warrant, which he obtained by means of having procured the goods to be warehoused in his own name.

The LORD CHANCELLOR.—I entirely agree with the opinion which has been so well expressed by the learned Lord Chief Justice. Messrs. Warwick & Clagett were the consignees of the goods; they were intrusted with the bill of lading, and, as intrusted with the bill of lading, they were also intrusted with the possession of the goods, and had all the rights incident to that possession, the right to pledge the goods to the extent of any lien they had upon them being one. The Legislature has drawn a distinction between persons intrusted with the possession of goods, and persons intrusted with those documents which are mentioned in the act,—documents which, among merchants, are considered as evidence of title, and pass by indorsement from one person to another. The Legislature intended to draw a distinction between the two; and if we were to hold that a person intrusted with the possession of goods, or with the bill of

1845.
HATFIELD
v.
PHILLIPS.

1845.
 {
 HATFIELD
 v.
 PHILLIPS.

lading which enabled him to get possession of them, was, as a matter of course, to be considered as intrusted with the dock-warrant or other instrument mentioned in the act of Parliament, there would be an end of this distinction. I therefore think that the opinion of the learned Judges is correct, viz. that the party intrusted with the bill of lading for the purpose of sale is not, in consequence of being so intrusted, to be considered as intrusted with the dock-warrant, notwithstanding that his possession of the bill of lading, and of the goods under it, enables him to obtain the dock-warrant. I am therefore of opinion, that the summing up of the learned Judge in this respect was correct, and that the exceptions cannot be maintained; and I propose that your Lordships' judgment shall be given for the defendants in error.

LORD BROUGHAM.—My Lords, that is the opinion which I entirely, throughout the arguments, both now and upon the former occasion, arrived at in considering this case. We heard part of the arguments in the absence of my noble and learned friend on the woolsack, and we thought there was a disposition, and in fact a necessity, on the part of the plaintiff in error, to contest the opinion of almost all the learned Judges who had given their opinions upon the subject, and that it was necessary, therefore, to hear it argued over again, and that we should delay the further consideration of the question, and have it argued in the presence of the learned Judges. I have come to no different opinion now from that which I entertained formerly; in fact, the reasons given by my noble and learned friend, following the opinion of the learned Judges, so succinctly stated by the Lord Chief Justice of the Common Pleas, appear to be perfectly satisfactory, and to take the proper distinction. I am therefore of opinion, with my noble and learned friend, that your Lordships would do well to give judgment for the defendants in error.

Judgment affirmed.

MEMORANDA.

SIR *William Webb Follett*, her Majesty's Attorney-General, died in Trinity Vacation (Saturday, June 28).

Sir *Frederick Thesiger*, her Majesty's Solicitor-General, succeeded to the office of Attorney-General; and

Fitzroy Kelly, Esq., one of her Majesty's Counsel, was appointed her Majesty's Solicitor-General, and subsequently received the honour of Knighthood.

In this Vacation, Mr. Serjt. *Shee* received a patent of precedence, entitling him to rank next after *William Page Wood*, Esq., Q. C.: *Montagu Chambers*, of Lincoln's Inn, Esq., was appointed one of her Majesty's Counsel, to rank next after Mr. Serjt. *Shee*; and *Robert Allen*, of Gray's Inn, Esq., was called to the degree of the coif, and gave rings with the motto "Hic, per tot casus."

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

MICHAELMAS TERM, 9 VICTORIÆ.

1845.

Nov. 3.

LOCKHART v. BARNARD.

A hand-bill relating to a stolen parcel offered a reward of £100 to "whoever should give such information as should lead to the early apprehension of the guilty parties:"

—*Held*, that the information must be given, not in mere conversation, but with a view to its being acted on, either to the person offering the reward or to his agent, or to some person having authority by law to apprehend the criminal. And where the communication was first made by the plaintiff to C. in conversation, but the information was afterwards communicated to a constable jointly by the plaintiff and C., it was held that they both ought to have joined in the action.

ASSUMPSIT.—The declaration stated, that heretofore, to wit, on &c., the defendant caused to be printed and published a certain advertisement, stating that a certain parcel, directed to Messrs. Sir Charles Price & Co., bankers, King William Street, London, containing certain bank notes, together with sundry bills of exchange, specially indorsed, payable to the order of the said Sir Charles Price & Co., had been lost or stolen in London on the afternoon of Monday the 25th then instant; and the defendant did thereby promise, that whoever would give such information as might lead to the immediate recovery of the above parcel if lost, or to the early apprehension of the guilty parties if stolen, should receive a reward of £100. And the plaintiff saith, that the said

And where the communication was first made by the plaintiff to C. in conversation, but the information was afterwards communicated to a constable jointly by the plaintiff and C., it was held that they both ought to have joined in the action.

parcel was stolen, and that he, confiding in the said promise of the defendant, afterwards, and before the commencement of this suit, to wit, on &c., did give such information as did then lead to the early apprehension of the guilty party, to wit, one J. Richards, who was afterwards, to wit, on the day and year last aforesaid, tried and convicted as such guilty party as aforesaid, whereof the defendant afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice; whereby and by reason of the premises, the defendant became and was liable to pay the said sum of £100 to the plaintiff, when he the defendant should be thereunto requested.—Breach, the non-payment of the said sum of £100, or anypart thereof.

The defendant pleaded, first, non assumpsit; secondly, that the plaintiff did not give such information as did lead to the early apprehension of the said J. R. in the declaration named, modo et formâ; thirdly, that J. R. was not the only guilty party, modo et formâ.

At the trial, before *Alderson*, B., at the last assizes for the county of Bedford, it appeared that this action was brought to recover a reward offered by the defendant for the recovery of a lost parcel, containing bank notes and bills of exchange, sent from Bedford to London by coach. A hand-bill was admitted and read, which, so far as it related to this case, was as follows:—"£100 Reward. —Lost or stolen, in London, on the afternoon of Monday the 25th inst., a parcel directed to Messrs. Sir Charles Price & Co., bankers, King William Street, London, containing the following bank notes, together with sundry bills of exchange, specially indorsed payable to the order of Messrs. Sir Charles Price & Co., payment of all which has been stopped." [Here followed a list of the notes.] "Whoever will give such information as will lead to the immediate recovery of the above parcel, with its contents safe, if lost, or the early apprehension of the guilty parties if stolen, shall receive the above reward. Measures are

1845.
 LOCKHART
 v.
 BARNARD.

1845.
LOCKHART
v.
BARNARD.

taken for discovery, if the above notes or bills are attempted to be fraudulently circulated.—27th September, 1843.” It was proved, that Richards, who was afterwards convicted of the felony, came on the 22nd of May, 1844, to the plaintiff’s shop, and, in payment for three pairs of stockings, tendered a £10 bank note. The plaintiff desired him to write his name on the note, and afterwards gave him the change for it. After making inquiries as to the address which Richards had written on the note, the plaintiff suspected it to be a forgery, and communicated his suspicions to a person named Cheshire, who thereupon informed the plaintiff that Richards had also passed notes to himself and others. Having afterwards heard of the robbery, the plaintiff and Cheshire related the above circumstances to several of their neighbours, and in the course of conversation, the plaintiff proposed to go for a constable; but a groom named Robinson, who was present, said he had better go, and accordingly went and brought back the constable, who, upon the information he received, was enabled to find out and apprehend Richards. The plaintiff was the only person who could identify him as having had any part of the stolen property in his possession. Richards was afterwards convicted and transported. Two objections were made on behalf of the defendant: first, that the communication made by the plaintiff to Cheshire was not such information as entitled the plaintiff to recover, it not having been made either to the party offering the reward or any agent of his, or to any person authorized by law to apprehend the criminal; secondly, that the information to the constable, being made jointly by the plaintiff and Cheshire, was not such information by the *plaintiff alone* as led to the apprehension of J. R., and that Cheshire should have been joined in the action as a co-plaintiff. On the first issue, the learned Judge directed the jury to find for the plaintiff, which they accordingly did; on the second, he desired them to consider, whether, in their opinion, the plaintiff communicated his information to the constable in

the first instance; and if they thought he had not, then whether the communication to Cheshire was made with a view to its being communicated by him to the constable, or whether it was not made to him merely with a view to further inquiry, and that both afterwards gave joint information to the constable. The jury found, that the information given to the constable by Robinson, and which led to the apprehension of the criminal, was the joint information of the plaintiff and Cheshire. The second issue was thereupon entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for himself, if the Court should be of opinion that the plaintiff was entitled to succeed upon the finding of the jury.

1845.
 LOCKHART
 v.
 BARNARD.

Byles, Serjt., now moved accordingly.—First, the information given by the plaintiff to Cheshire in the first instance, and which led to the apprehension of the felon, was sufficient information within the meaning of this advertisement. It is sufficient if the information be given to the defendant or to his agent, or to a peace officer, or to any other person, provided it actually leads to the apprehension of the offender. The case of *Lancaster v. Walsh* (a) is the leading case upon this subject. There it was held, that the only person entitled to the reward was he who *first* gave information by which the stolen notes were traced to the robbers, so as to ensure their conviction, and that it was not necessary that such information should be communicated to the party robbed, but it was sufficient if it was given to a person authorized to receive it, and to act upon it in the apprehension of the offenders, as to a constable. The principle of that case is applicable to the present; for, where a felony has been committed, private individuals are justified in apprehending the criminals in order to bring them to justice, and the law requires that they should do so. There is nothing

(a) 4 M. & W. 16.

1845.
 LOCKHART
 v.
 BARNARD.

there to shew that information given with a view to the apprehension of the guilty party, though to a third person, is not sufficient. In this case, the person who first gave the information in consequence of which the felon was brought to justice is entitled to the reward, and that was the plaintiff. If it were otherwise, the real informer might be deprived of his reward by any person to whom he accidentally mentioned his information going to the advertiser and giving the information in his own name. [*Parke, B.*—You say it is sufficient if a person tells the matter to another, and he gives the information to a constable.] Yes, if he does it, not in idle conversation, but with a view to the apprehension of the felon. It was held in *Williams v. Carwardine* (a), that it made no difference that the plaintiff was led to inform, not by the proffered reward, but by other motives; and so it can make no difference that the plaintiff had not at the time any suspicion of the robbery. Then, secondly, the non-joinder of Cheshire is immaterial. There was not the least evidence that the plaintiff knew what Cheshire had done; and it was not contended, at the trial, that the plaintiff's communication to Cheshire would not have been sufficient to cause the apprehension of the felon.

POLLOCK, C. B.—I am of opinion that the direction of my Brother *Alderson* was correct, and I think the jury have come to a proper verdict on the second issue. The question is, what is the meaning of the expression "*such information* as may lead to the early apprehension of the guilty party." In the case of *Lancaster v. Walsh*, the words were, "information by which the same may be traced;" and it was there decided, that a communication to a constable, whose duty it is to search for the offender, was within the terms of the hand-bill. I do not mean to say that there might not be circumstances under which

(a) 4 B. & Ad. 621; 1 Nev. & M. 418.

the doctrine of that case might be properly extended to other persons than constables; but I think, in this case, it ought not to be so extended. Here the plaintiff communicates certain information to Cheshire, who, in return, makes a communication to him; and then, deeming their joint knowledge sufficiently important to call for further inquiry, they jointly communicate it to Robinson and others, and he, as the agent of both, communicates it to a constable. I therefore think, that the finding of the jury, that the information which led to the detection of the felon was given, not by Lockhart alone, but by him jointly with Cheshire, and the entry of the verdict upon that finding, were perfectly right, and that no rule ought to be granted.

1845.
 LOCKHART
 v.
 BARNARD.

PARKER, B.—I am of the same opinion. According to the true construction of this advertisement, the information must be given, with a view to its being acted on, either to the person offering the reward, or his agent, or some person having authority by law to apprehend the criminal; and therefore I think my Brother *Alderson* was correct in leaving to the jury the nature of the first communication from the plaintiff to Cheshire, viz. whether it was made with a view to its being acted on, or merely in the course of conversation, and afterwards communicated, through Robinson, to the constable by both of them. Then, assuming that the information was communicated to the constable jointly by the plaintiff and Cheshire, ought they not both to have joined in the action? I think they ought, seeing there is but one reward offered for certain information, and that both of them concurred in giving it. The second issue was, therefore, rightly found for the defendant; and, indeed, the jury would have been justified in finding for the defendant on non assumpsit; but, there being no motion before us as to that issue, it is unnecessary to give any opinion on it.

1845.
 LOCKHART
 v.
 BARNARD.

ALDERSON, B.—I have no doubt I was wrong in directing the jury to find for the plaintiff on non assumpsit.

ROLFE, B., concurred.

Rule refused.

Nov. 3.

COCK v. GENT and Others.

Where a cause was referred by a Judge's order, which gave no express power to direct a verdict to be entered, but the arbitrators awarded a verdict to be entered with damages and costs, the Court discharged a rule which had been obtained to enforce the award by attachment, leaving the plaintiff to pursue his remedy by action.

A RULE had been obtained by the plaintiff, calling upon the defendants to shew cause why an attachment should not issue against them for non-payment of 38*l.* 15*s.* pursuant to the award, rule of Court, and Master's allocatur. Against that rule

Wordsworth now shewed cause.—This case has already been before this Court on a motion to set aside the award (a), on the ground that the arbitrators had ordered a verdict to be entered, when no express power had been given them to do so. *Jackson v. Clarke* (b) and *Donlan v. Brett* (c) were then cited, but *Parke*, B., said that those cases only shewed "that an attachment will not be issued in such a case." And, after saying that the Court ought not to set aside the award unless they were clear that it was void, he added, "If the plaintiff seeks to enforce it by action or attachment, the question may then be raised, whether he is entitled to do so." The plaintiff has now set himself in motion, and moves for an attachment for non-performance of the award. If it be doubtful whether the award is good, the Court will not decide that question on shewing cause against a rule for an attachment, but will leave the party to his remedy by action to enforce the performance of it. The award, however, it is submitted, is clearly bad for directing a verdict to be entered, without any express

(a) 13 M. & W. 364.

(b) M'Clell. & Y. 200.

(c) 2 Ad. & Ell. 344.

power having been given for that purpose. The Court will therefore not enforce it by attachment.—The Court then called on

1845.

Cock
v.
Gent.

Petersdorff to support the rule.—This application was made to give effect to a distinct part of the award from that which orders the verdict to be entered. The award orders the defendants to pay the costs, and the plaintiff is now seeking to give effect to that part of it, which is altogether distinct from the direction to enter the verdict. [*Alderson*, B.—The award must be final as to all matters referred. Here there are two, the cause and the costs. If the arbitrators have awarded only as to the costs, then it would not be final, as the award would not have determined the action. *Pollock*, C. B.—If you are obliged to resort to an action to enforce one part of it, why should you not bring it for both? *Alderson*, B.—If that action is determined against you, then it will shew that there ought to be no attachment. *Parke*, B.—The arbitrators had power to decide upon the action and the costs of the action, and they do not decide the action. In *Hawkyard v. Greenwood* (a), where the arbitrator, having no power to do so, ordered a verdict to be entered, it was held that the award was bad for excess of authority, and that that portion of it would not be rejected as redundant. *Coleridge*, J., there says, “The rule as to striking out parts as surplusage applies only where the remainder would not be inconsistent with the whole award if that part were not struck out.”]

POLLOCK, C. B.—In *Jackson v. Clarke* the arbitrator awarded as follows:—“I award and direct that a verdict in this cause be finally entered for the said plaintiffs, with

(a) 14 Law J. Rep., N. S., Q. B. 236; S. C., nom. *Hawkyard v. Stocks*, 2 Dowl. & L. 936.

1845.

Cock
v.
Gent.

284*l.* 12*s.* damages." And it was expressly decided, that the award, being comprised in one sentence, from which the clause containing the excess of authority could not be struck out without leaving the remainder a mere *caput mortuum*, could not be divided. And in *Donlan v. Brett*, it was decided that an award of the entry of a verdict with damages was not tantamount to awarding a sum of money. I am of opinion that this rule ought to be discharged.

PARKE, B., and ALDERSON, B., concurred.

Rule discharged, with costs.

Nov. 5.

DOE *d.* HULL *v.* WOOD.

W. H., being tenant from year to year to Lady H., died, leaving his widow in possession. J. H. some time afterwards took out administration to the deceased; but the widow continued in possession, paying rent to Lady H., with the knowledge of J. H., who never objected to such payment, or made any demand of rent:—*Held*, first, that there was no evidence of a surrender by operation of law, so as to create the relation of landlord and tenant between Lady H. and the widow; secondly, that there were no circumstances from which a tenancy from year to year to the administrator could be presumed.

EJECTMENT upon a demise by one John Hull, dated the 26th of February, 1845.

At the trial, before *Tindal*, C. J., at the last Surrey Assizes, it appeared that the premises in question were formerly occupied by one William Hull, as tenant to Lady Hotham, under a lease which terminated in the year 1831; but he continued in possession, paying rent to Lady Hotham, until his decease in August, 1842. His widow had since remained in possession, paying rent to Lady Hotham up to Christmas last. Letters of administration were granted to the lessor of the plaintiff, who was the father of William Hull, on the 15th of March, 1844; but he never received or demanded any rent for the premises. In October, 1844, the deceased's widow married Henry Wood, the defendant, who had paid rent to Lady Hotham since his marriage. The demise was laid on the 26th of February,

1845, two days after a demand of possession had been made. It was proved that the plaintiff knew the rent was paid to Lady Hotham, and that he had never made any objection to such payment, or required it to be paid to himself.

1845.
DOR
d.
HULL
v.
WOOD.

It was contended for the defendant, at the trial, that the lessor of the plaintiff had not made out any title: first, because the evidence shewed that, at the time of the demise, there was no term in existence, and nothing to shew that the lessor of the plaintiff had any interest in the premises; secondly, that if the facts established any tenancy at all, it was a tenancy to Lady Hotham; or, even assuming that they shewed a tenancy to the administrator, it was a tenancy from year to year, and a six months' notice to quit was necessary. The learned Judge directed the jury to find for the plaintiff, but gave leave to the defendant to move to enter a nonsuit on the above points.

Montagu Chambers now moved accordingly.—The widow of William Hull having continued in possession, and paid the rent to Lady Hotham, with the privity of John Hull, the administrator, it must be inferred that she became tenant to Lady Hotham with his consent, and that tenancy must be assumed to be a tenancy from year to year. If that be so, then the lessor of the plaintiff, the administrator, ceased to have any interest in the premises, and had therefore no title to sue. [*Parke*, B.—The tenancy from year to year, which belonged to William, passed to John as administrator; and that tenancy was never determined, either by surrender or otherwise.] The circumstances are such from which a surrender by operation of law may be implied: *Thomas v. Cook* (a). The possession was lawful, and the administrator never demanded the rent; and, at the time that the letters of administration were taken

(a) 2 B. & Ald. 119.

1845.

DOE
d.
HULL
v.
WOOD.

out, a two years' tenancy by the widow had existed. [Rolfé, B.—It cannot be contended that the administrator loses his right, because he does not take out administration for eighteen months or two years.] The facts are sufficient to imply a surrender in law. [Parke, B.—I think not.] Then, secondly, assuming that there was no such surrender, and that the relation of landlord and tenant between Lady Hotham and the widow did not exist, the payment of rent to Lady Hotham, with the consent of the administrator, was virtually a payment to him, and might create a tenancy from year to year to him. [Parke, B.—If it amounts to anything, it is that of a mere agreement that she shall pay the rent to Lady Hotham; but that does not create any tenancy to him. Here the plaintiff proved a clear *prima facie* case, as there was a tenancy from year to year, which passed to the administrator. Then you say there was evidence of something which, according to *Thomas v. Cook*, amounts to a surrender. If it had been shewn that Lady Hotham had accepted the widow as tenant, and the administrator had assented to it, then the case would have been brought within the decision in *Thomas v. Cook*.] The administrator's having a full knowledge that the widow was in possession and paying rent to Lady Hotham, virtually amounts to an assent to her doing so, so as to make her tenant to him. There ought therefore to have been a six months' notice to quit, to entitle the plaintiff to recover: *Right d. Flower v. Darby* (a). [Parke, B.—That case was cited in *Richardson v. Langridge* (b), and commented upon by the Judges, and particularly by *Chambre, J.*, who “denied the proposition, that, at this day, there is no such thing as a tenancy at will; the taking of the dung by the landlord gave the tenant no interest in the premises. Surely the distinction has been a thousand times taken; a mere general letting is a letting at will: if

(a) 1 T. R. 159.

(b) 4 Taunt. 128.

the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said that is evidence of a taking for a year." Here a quarterly rent was paid. [*Parke*, B.—Not by the widow to the lessor of the plaintiff.]

1845.

DOE
d.
HULL
v.
WOOD.

POLLOCK, C. B.—I am of opinion that no rule ought to be granted in this case. This is an ejectment brought by the administrator of William Hull against John Wood; and it has been contended, that, from the circumstances of the case, it must be presumed that the defendant was tenant from year to year under the administrator, or that the facts proved amount to a surrender or an assignment, and that he became tenant to Lady Hotham. The facts of the case appear to be, that William Hull, who was tenant from year to year, died in August, 1842; that his widow continued in possession of the premises, and might, if she had thought proper, have taken out administration to her husband, in which case the term from year to year would have vested in her. She, however, remained in possession without taking out administration, and continued to occupy the premises, paying rent to Lady Hotham, (who, no doubt, had a right to go on the premises and demand rent of any person she found in possession); and, having married the defendant, it afterwards appears that, on the 15th of March, 1844, John Hull took out administration to the deceased. At that time it seems quite clear that he had a right to demand possession of the premises. The term might be a valuable one or it might not; but the principles of law are the same in the one case as in the other. It is perfectly clear, that, on taking out administration, John Hull might have recovered possession of these premises for the benefit of creditors, or any other legal purpose: the question then is, has he done anything since to divest himself of that right? He has done nothing, but simply permitted matters to go on as before; and are we

1845.

Doe
d.
HULL
v.
WOOD.

or the jury to presume from that an agreement for an under-tenancy from year to year between the administrator and the occupier? How can we presume such a tenancy from the fact that the rent was paid, not to the administrator, but to the owner of the property, Lady Hotham? I think there is no foundation for it. The only legitimate presumption appears to me to be, that the occupier, knowing she had no title to the premises, continued therein, paying rent to Lady Hotham, and liable at any time to be required to give up possession.

PARKE, B.—I am entirely of the same opinion. The lessor of the plaintiff has proved a tenancy from year to year in William Hull, the decease of William Hull, and letters of administration granted to himself in March, 1844. The term (for a tenancy from year to year is a term) therefore vests in him until there is some legal determination of it; and thus he has made out a good *prima facie* case, because the onus of shewing a legal determination of the term rests on the defendant. In this case I think there was no evidence that this tenancy from year to year had been determined by operation of law, as suggested, viz. by surrender, according to the authority of *Thomas v. Cook*, either by the administrator allowing the widow to occupy the premises under Lady Hotham, or by a virtual assignment of them. In order to make out that, it must be shewn that there was the relation of landlord and tenant, with the assent of the administrator, between Lady Hotham and the defendant. But it is further contended, that the widow, if not tenant to Lady Hotham, was tenant from year to year to the administrator, and was entitled to six months' notice to quit; but there is no evidence at all to shew an agreement for a tenancy from year to year to the administrator: it only amounts to this,—that he allowed her to pay the rent for him to the head landlord instead of to himself. We cannot in-

fer a tenancy from year to year from a simple payment by the occupier. *Richardson v. Langridge* correctly lays down the law on this subject, viz. that a simple permission to occupy creates a tenancy at will, unless there are circumstances to shew an intention to create a tenancy from year to year; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of a year. That was not so here, and I think there should be no rule.

1845.

DOE
d.
HULL
v.
WOOD.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

DOE d. HUTCHINSON v. THE MANCHESTER, BURY, AND ROSSENDALE RAILWAY. Nov. 6.

THIS was an action of ejectment, brought by the plaintiff to recover from the defendants the possession of certain pieces of land, which the plaintiff held by a lease for years under the Earl of Derby, and which had been taken by the defendants for the purposes of the railway, under the railway, for the absolute purchase of their interest therein; and provided, that if any difference should arise between them as to the value of the lands, or the compensation to be made in respect of them; or if by reason of absence the owner should be prevented from treating; or if he should fail to disclose or prove his title to the lands, &c., the amount of compensation should be settled by a jury, in the manner mentioned in the act. Another clause provided, that if the owner of any lands, on tender of the purchase-money or compensation agreed for or awarded to be paid in respect thereof, should refuse to accept it; or if he should fail to make out a title to the lands in respect whereof such purchase-money or compensation should be payable, to the satisfaction of the company; or if he should be gone out of the kingdom, or could not be found, or should refuse to convey, it should be lawful for the company to deposit the purchase-money or compensation payable in respect of such lands in the Bank of England, in the name of the Accountant-General, and thereupon all the interest in such lands, in respect whereof such purchase-money or compensation should have been so deposited, should vest absolutely in the company:—*Held*, that this latter clause applied *prospectively* to the period *after* the purchase-money was agreed upon, or the amount of compensation was settled by the jury; and therefore that the company could not, immediately upon the finding of the jury, pay the amount awarded by them into the Court of Chancery, and take possession of the land, but must first call upon the owner to make out a title to their satisfaction, although *before* the assessment by the jury he had failed to disclose or prove his title.

A railway act gave the company power to agree with the owners of lands which they were empowered to take for the purposes of

1845.

DOE
d.

HUTCHINSON

v.
MANCHESTER,
BURY, AND
ROSSENDALE
RAILWAY CO.

the 153rd section of their act of Parliament, 8 Vict. c. lx (a).

At the trial, before *Cresswell, J.*, at the last assizes at

(a) By sect. 136 of this act, power was given to the company to agree with the owners of the lands which they were authorized by the act to enter into and take for the purposes of the railway, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they should think proper, and of all subsisting leases therein, and all rent-charges and incumbrances affecting such lands, and all commonable and other rights to which such lands might be subject, and all other estates or interests in such lands, of what kind soever.

Sect. 153, for the purpose of providing for the payment and application in certain cases of the purchase-money or compensation to be paid in respect of any lands not belonging to parties under disability, enacted, "that, in the following cases, that is to say, if the owner of any such lands, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid, refuse to accept the same; or if any such person *fail to make out a title to the lands in respect whereof such purchase-money or compensation should be payable*, or to the interest therein claimed by him, to the satisfaction of the company; or if such owner shall be gone out of the kingdom, or cannot be found, or be not known, or shall refuse to convey or release such lands as directed by the company, it shall be lawful for the company to deposit

the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to be placed to his account therein, to the credit of the parties interested in such lands, &c.; and thereupon all the interest in such lands, in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the said company."

Sect. 161 requires the company to give notice to the parties interested, in manner therein mentioned, of their intention to treat for any lands; and by sect. 162, the parties are to state their claim within one month after such notice.

Sect. 160 provides, that if any difference shall arise, or if no agreement can be come to between the company and the owner of any lands, or of any interest in such lands, taken or required for, or injuriously affected by, the execution of the said railway, &c., as to the value of such lands or any interest therein, or as to the compensation to be made in respect thereof; or if, by reason of absence, any such owner be prevented from treating; or if any such owner *fail to disclose or prove his title* to any such lands, or any interest therein; or if, by reason of any impediment or disability, any such owner be incapable of making any agreement, conveyance, or release necessary

Liverpool, it appeared that the company, having purchased from Lord Derby the reversion of the lands in dispute, sent the plaintiff notice, in July 1844, of their intention to treat with him for his interest in them; and in the November following they made him an offer of £3500, with notice of their intention to summon a jury to assess the amount of compensation to which he was entitled. On the 13th January, 1845, (the plaintiff not having in the meantime given the company any information as to his title or interest, nor made any communication to them), an inquisition was held accordingly, and the jury made their assessment, awarding the plaintiff the sum of £4000. After the delivery of their verdict, the plaintiff's attorney said to the defendants' agent, "You shall never construct your railway, unless you come to some arrangement satisfactory to Mr. Hutchinson." The company, however, without afterwards calling upon the plaintiff to make out his title to the land, paid the amount of the compensation-money into the Court of Chancery, in the manner directed by the statute, and began to construct their railway over the land, upon which the plaintiff brought this ejectment. Upon these facts, the learned Judge stated to the jury, that, in order to entitle the company to pay the compensation-money into the Court of Chancery, and take possession of the land, they were bound to call upon

1845.
 Do
 d.
 HUTCHINSON
 v.
 MANCHESTER,
 BURY, AND
 ROSENDALE
 RAILWAY CO.

for enabling the company to take such lands, or to proceed in making the railway or works, &c.; or if any such difference arise as to the amount of the damage occasioned to any lands by the temporary occupation thereof in making the railway, &c., or otherwise in the execution of the power given by the act, and for which any party may be entitled to demand compensation according to the provisions of this act, in all such cases

the amount of the compensation to be paid by the company is to be settled by a jury.

By sect. 166, the company are to give notice of their intention to summon a jury, and to state in such notice how much they are willing to give for the lands.

By sect. 223, parties claiming compensation for lands held by leases may be required by the company to produce the leases, &c.

1845.
 {
 DOB
 d.
 HUTCHINSON
 v.
 MANCHESTER,
 BURY, AND
 ROSSENDALE
 RAILWAY CO.

the lessor of the plaintiff, after the assessment of the compensation, to make out his title to the land; and therefore that their possession was wrongful, and the plaintiff was entitled to recover. A verdict was accordingly taken for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of the contrary opinion.

Baines now moved accordingly.—The defendants have complied with the requisitions of the act of Parliament. Taking all its enactments together, it sufficiently appears that there has been such a failure on the part of the plaintiff to make out a title to the land as entitled the company to pay the compensation-money into court, and take possession of the land. The Legislature appear to have intended to vest a complete title in the railway company, without any conveyance, where the owner of the land refuses to state the nature of his rights. Here he refused to do so in the first instance; and the declaration of his attorney at the time of the taking of the inquisition shewed a determination to persist in that refusal. [*Alderson*, B.—The words of the 153rd section are: “If any such person fail to make a title to the lands in respect whereof such purchase-money or compensation shall be payable.” No purchase-money or compensation was payable in respect of these lands until after January, 1845.] It is sufficient that they are the same lands in respect of which the compensation is afterwards awarded. [*Pollock*, C. B.—All the provisions of the 153rd section have reference to the period *after* the purchase-money is agreed for or assessed by the jury. *Alderson*, B.—It is clear that, if the plaintiff were out of the country at the time mentioned in the 164th section, it would not dispense with your calling upon him, under sect. 153, *after* the taking of the inquisition. That shews that the two sections are to be construed distinctly and separately, with respect to the different periods of

time.] It is submitted that the latter section is a key to the former, and shews what is the failure of title meant in sect. 153. The company having commenced their works on this land, are in a difficult and embarrassing position; and if a rule be granted, it may lead to some arrangement between the parties.

1845.
 Dox
 d.
 HUTCHINSON
 v.
 MANCHESTER
 BURY, AND
 ROSENDALE
 RAILWAY Co

POLLOCK, C. B.—I am of opinion that no rule ought to be granted in this case. It appears to me that the language of the 153rd section of the act, on which the question turns, is perfectly clear; and we certainly ought not, merely in order to give parties an opportunity of coming to some arrangement, to raise doubts in the minds of others, where we entertain none ourselves. The only part of the 153rd section which is applicable to the question before us is that which enacts, “that if the owner of any lands, &c. shall fail to make out a title to the lands in respect of which such purchase-money or compensation shall be payable, or to the interest therein claimed by him, to the satisfaction of the company; or if such owner cannot be found, or be not known, or refuse to convey or release such land as directed by the company, it shall be lawful for the company to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery.” Now, the various alternatives mentioned in this clause appear to me to be all of them alternatives arising *after* the assessment of the damages, and after the compensation-money has been ascertained. Indeed, the words appear to me, when perfectly construed, to be as plain as if these words were introduced—“if any such person shall, after the amount of compensation-money has been ascertained, fail to make out a title,” &c.; in which case it clearly would be the duty of the company, after the amount of the compensation-money had been ascertained by the verdict of the jury, to call

1845.
 }
 DOR
 d.
 HUTCHINSON
 v.
 MANCHESTER,
 BURY, AND
 ROSENDALE
 RAILWAY CO.

upon the party to make out a title to the land, if he were willing to accept that amount; on his failing to do which, and then only, they would be entitled to pay the money into the Court of Chancery. I observe, indeed, that the clause is worded very favourably to the company; for the provision is, "if he shall fail to make out a title *to their satisfaction*." It is said that the company are placed in a difficulty, in consequence of their having begun to construct their works upon this land: but they need never have placed themselves in that position; for unless there had been some feeling of hostility, such as that which displayed itself in the expressions used after the finding of the jury, why did not the company, when they found that the plaintiff was proceeding with an ejectment, call upon him to make out a good title? Even now they are not too late to do so; it is still open to them, indeed, to tender the amount of the compensation assessed by the jury, and, if the plaintiff refuses to accept it, to pay to his account the money which is already in Chancery. I agree with the learned counsel that this case is an important one, for it is in substance this: Is a railway company, or any other company, entitled to say to a person whose land they require, "Because you would not render us any assistance before we went before the compensation jury, we will take your land without any further communication?" And, called upon as we are to say whether the title of this company was perfect, we are bound to say that it was not; that no absolute interest has yet vested in them; and therefore that the lessor of the plaintiff was entitled to recover in this ejectment.

PARKE, B.—I am of the same opinion. It seems to me that the true construction of the 153rd section, and of the conditions contained in it, is, that the provision empowering the company to pay the purchase or compensation-money into the Court of Chancery is *prospective*, applying

to the case where the party fails to make out his title to the land, after the inquisition has been executed, and the money has been ascertained and become payable. But admitting, for argument's sake, that it were otherwise, and that if the plaintiff had *previously* refused to make out a title, the company would be justified in taking the course they have done, still the facts before us do not support their case; for here there does not appear to have been any such refusal on the part of the plaintiff to disclose or make out his title. The company are entitled, by the 164th section, to proceed to an inquisition on the non-compliance by the parties with certain conditions; one of which is, if the owner of the land fail to disclose his title, or, having disclosed it, fail to prove a good title, that is, if he cannot make it out to the satisfaction of the company. And I concur with the Lord Chief Baron, that the 153rd section is to be construed prospectively, with reference to acts to be done after the inquisition; and there is this very good reason for it, that a party who was unable in the first instance to make out a title might find the means of doing so after the inquisition, and ought to have the means afforded him of remedying the defect, before he is compelled to apply to the Court of Chancery. I think, therefore, that the ruling of my Brother *Cresswell* was perfectly right, and that there ought to be no rule.

ALDERSON, B.—I am of the same opinion. The 164th section of the act no doubt provides, that if the owner of lands fail to disclose or prove his title, the company may go before a jury to assess the compensation which is to be paid to him for them: for which provision there is this obvious reason, that the failing to disclose his title prevents any offer from being satisfactorily made to him, and the failing to prove it prevents any valid agreement from being come to; and therefore they have the right, in that case, of resorting to the compulsory clause. But when we turn to

1845.
 Dox
 d.
 HUTCHINSON
 v.
 MANCHESTER,
 BURY, AND
 ROSENDALE
 RAILWAY Co.

1845.
 Doe
d.
 HUTCHINSON
v.
 MANCHESTER,
 BURY, AND
 ROSENDALE
 RAILWAY CO.

the 153rd section, and see what it requires to be done in failure of making out a good title, it is obvious that the party ought to have an opportunity afforded him to remedy that defect, which before arose from his inability or his want of inclination to prove his title. He is then in a very different situation, after the decision of the jury, and ought to have that *locus pœnitentiæ* allowed him: if, after all that information has been given him, and this change of circumstances has taken place, he still refuses to proceed, the company may go on without him. Why should not this clause be so construed? It is clear that *some* of its words are to be construed prospectively; as, for instance, the case of the owner of the land being out of the kingdom; for it is clear that, if the owner were abroad at the time of the first offer, but in the way when the compensation was assessed, the company would have no right at once to pay the money into Chancery. It must therefore be future as to that, and why not also as to the other cases, when we thereby give the best effect to it, in favour of a party whose land is to be taken from him compulsorily, and by a very stringent process? The statute gives this company power to take a man's land without any conveyance at all; for if they cannot find out who can make a conveyance to them, or if he refuse to convey, or if he fail to make out a title, they may pay their money into Chancery, and the land is at once vested in them by a parliamentary title. But, in order to enable them to exercise this power, they must follow the words of the act strictly, and they have not done so here. This clause therefore fails them as a defence; and the consequence is, that the plaintiff is still entitled to the land.

ROLFE, B.—I am clearly of the same opinion. The clear object of this act was to enable parties claiming compensation for their lands to make out a good title, after they should have ascertained what was the amount of com-

pensation they were to receive. Here an offer is made by the company, which the plaintiff treats as a nullity; upon which the company, who want the land for their works, apply to a jury to assess the compensation, and it is assessed accordingly. After that was done, they were bound to call upon him to shew his title; and until they had done so, they had no right to take possession of his land, and pay the compensation-money into Chancery. Neither the letter nor the spirit of the act bears such a construction, and it would be most unjust if it did.

1845.
Doe
d.
HUTCHINSON
v.
MANCHESTER,
BURY, AND
ROSSENDALE
RAILWAY Co.

Rule refused.

ATKINSON and Others v. SMITH.

Nov. 8.

ASSUMPSIT.—The declaration stated, that heretofore, to wit, on the 22nd of November, 1844, it was agreed between the plaintiffs and the defendant, that the defendant should sell to the plaintiffs, and the plaintiffs should buy of the defendant, a large quantity, to wit, twenty-four packs of *noils*, to be delivered by the defendant to the plaintiffs within a reasonable time, and to be paid for on delivery thereof; and thereupon, in consideration of the premises, &c., and that the plaintiffs had promised to defendant to accept and pay for the same, he the defendant promised the plaintiff to deliver the said noils in a reasonable time. Breach, that, although the defendant delivered to the plaintiffs part of the said noils, yet that he did not nor would, within a reasonable time, deliver the residue thereof.—Plea, non assumpsit.

At the trial, before *Rolfe*, B., at the last York Assizes, it

The plaintiffs, Messrs. A. & Co. and the defendant, entered into the following contract:—
“Bought of Messrs. A. & Co., about thirty packs of Cheviot fleeces, ewes and hogs; and agreed to take the under-mentioned *noils* [coarse woollen cloths]; also agreed to draw for £250 on account at three months.”
The quantity and quality of the noils were then specified:—*Held*, that this was one

entire contract, and that A. & Co. could not sue for the non-delivery by the defendant of the noils, without averring the delivery or tender to the defendant of the fleeces.

1845.
 ATKINSON
 v.
 SMITH.

appeared that, in November 1844, the defendant's agent applied to the plaintiffs to sell to the defendant some Cheviot fleeces, and at the same time agreed, on his part, to sell to the plaintiffs a quantity of coarse woollen cloths called "noils." The following note was exchanged between the parties:—

"Bought of Messrs. W. F. Atkinson & Co. about thirty packs of Cheviot fleeces, ewes and hogs, and agreed to take the under-mentioned noils; also agreed to draw for £250 on account, at three months.

"16 packs No. 5 noils, at 10½*d.*

"8 packs No. 4 noils, at 12*d.*

"S. & W. SMITH,

"22nd Nov., 1844.

"P. H. SIMPSON."

It appeared that the plaintiffs supplied to the defendant a part only of the fleeces agreed for; and on the other hand, that the defendant delivered to the plaintiffs part of the noils, but, on their rising in price, refused to deliver the remainder; on which this action was brought. It was contended for the defendant, under these circumstances, that the plaintiffs could not recover, for that they were bound, the whole being one contract, to have averred and proved, as a condition precedent, the delivery or tender of all the fleeces to the defendant: and the learned Judge, being of this opinion, directed a nonsuit, reserving to the plaintiffs leave to move to enter a verdict for £25, if the Court should think that the agreements of the parties were not dependent agreements.

Baines now moved accordingly.—The only question in this case is, whether the agreements of the plaintiffs to sell the fleeces, and to *take* the noils, are dependent or independent agreements. If they are independent, each party of course has his remedy against the other for the non-per-

formance of either of them. If the word "take" is to be construed to mean "take in part payment" for the fleeces, the ruling of the learned Judge was correct; but it would rather seem to mean "take by way of purchase." The acts and conduct of the parties are to be looked at in aid of the construction of the contract; and the defendant's refusal to deliver the remainder of the noils, because the market had risen, shews that he considered it a purchase of the noils. [*Alderson*, B.—Surely it is all one contract. The one sale is the consideration for the other. The plaintiffs should have declared on a contract, that, in consideration that they would sell wool, the defendant would deliver noils by way of part payment, and give a cheque for £250 for the residue. *Parke*, B.—The plaintiffs say, "We will sell you wool at such a price, provided you will sell us noils at such a price." They are not independent contracts, but the whole is one entire contract; and if the plaintiffs do not supply the fleeces, the defendant is not bound to supply the noils. Even if the word "take" means to take by way of purchase, the result is the same, one stipulation being dependent on the other.]

1845.
 ATKINSON
 v.
 SMITH.

PER CURIAM (a),

Rule refused.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

1845.

Nov. 10.

DOE *d.* SAMS *v.* GARLICK.

A testator, after charging certain lands with an annuity to his wife for her life, and giving them successively to several persons for life, devised them as follows:—"And, from and after &c., I give and devise the same (but subject and charged as aforesaid) to such person or persons as at the time of my decease shall be the heir or heirs-at-law of William Hull, formerly of Pisford, Esq., who was formerly the owner of the said messuages, &c., and who devised the same to my first wife Lydia, and which estate and premises descended to and became vested in my late son, W. G., as the only son and heir-at-law of my said late wife Lydia, and which said premises, &c. my said son W. G. devised to me in fee simple:"—*Held*, that the words "such person or persons as at the time of my decease shall be the heir or heirs-at-law of W. H.," were merely a designatio personarum; and that the person answering that description took an estate for life only in the devised premises.

A devise of an indefinite estate, without words of limitation, *prima facie* is a devise for life only; and a previous charge on the *estate*, without any charge on the devisee in respect of it, will not enlarge it into a devise of an estate in fee.

EJECTMENT for lands, houses, &c. at Pisford, in the county of Northampton. The facts were, by consent of the parties, stated for the opinion of the Court, under a Judge's order, in the following case:—

The question in this case arises under the will of Thomas Garlick, of Toddington, in Bedfordshire, who died in the year 1824, in possession of the estate in question, which came into his family under the will of William Hull of Pisford, who died in 1782. William Hull of Pisford had a brother named Jonas, and a sister named Elizabeth, who married one Jonathan Balls. Jonas Hull had a son and heir, named William, afterwards known as William Hull of Fakenham, who was the heir-at-law of his uncle, William Hull of Pisford, at the time of the death of the testator, Thomas Garlick. William Hull of Fakenham died in 1840, leaving several children, of whom the lessor of the plaintiff became the sole trustee. Elizabeth Balls, the sister of William Hull of Pisford, had a daughter, Lydia Balla, who afterwards became the first wife of the testator, Thomas Garlick. William Hull of Pisford, by his will, of the 30th of July, 1776, devised the Pisford estate to his niece, Lydia Balls, (afterwards the wife of Thomas Garlick), for life, with remainder to her first and other sons in tail, with other remainders over, with ultimate remainder to his own right heir. Thomas Garlick, of Barnsley, who died in 1793, had, among other children, two sons, the elder of whom, and his heir-at-law, was one Anthony Garlick, of Pogmore, who died in 1808; and the younger of whom was the testator,

Thomas Garlick of Toddington. Anthony Garlick of Pogmore had nine children, his eldest surviving son and heir being Anthony Garlick of Greetham, (the testator's nephew, and devisee for life of the Pisford estate), who died in 1840, without issue; and the second surviving son of Anthony Garlick of Pogmore was another Thomas Garlick, who died in America about 1835, leaving several children, his eldest son and heir-at-law being William Garlick, the defendant. Thomas Garlick had by his wife Lydia (the first tenant for life under the uncle's will) two children, namely, William Hull Garlick, and Edith, afterwards the wife of Matthew Berry. On the death of Lydia Garlick, her son entered into possession of the estate, of which he suffered a recovery, and afterwards, by his will, devised the same to his father, the testator, Thomas Garlick of Toddington, who thus became owner of the estate in fee simple on the death of his son, in 1807. Edith Berry had but two children, one of which was still-born, and the other lived but a few hours.

The testator Thomas Garlick died in the year 1824, having by his will, which bore date the 24th May, 1821, devised as follows:—"I give and devise all my messuages, &c. to the use of the said John Slade and David Lee Willis, their executors &c., during the natural life of my said daughter, Edith Berry, but upon the trusts hereinafter mentioned, and subject and chargeable in the meantime to and with the payment of a clear annuity or yearly sum of £100 unto my said wife, Elizabeth Garlick; and, from and after the decease of my said daughter, I give and devise all my said messuages, cottages, farms, and hereditaments in the said county of Northampton, subject as aforesaid, unto and to the use of all and every the sons and daughters of my said daughter, Edith Berry, lawfully to be begotten, as tenants in common, and not as joint-tenants, and to their respective heirs and assigns for ever; and, in case my said daughter shall have but one child, then I give and devise the same messuages, cottages, farms, lands, tenements, and heredita-

1845.
DOE
d.
SAMS
v.
GARLICK.

1845.
 {
 DOR
 d.
 SAMS
 v.
 GARLICK.

ments in the said county of Northampton (but subject and charged as aforesaid) unto such only child, his or her heirs and assigns, for ever; and, in case my said daughter shall have no children, then I give and devise the same messuages, subject and charged as aforesaid, to Anthony Garlick of Greetham, in the county of Lincoln, farmer, son of my late brother, Anthony Garlick, deceased, and his assigns, for and during the term of his natural life; and, from and after his decease, I give and devise the same (but subject and charged as aforesaid) *to such person or persons who at the time of my decease shall be heir or heirs-at-law of William Hull, formerly of Pisford, Esq., deceased, who was formerly owner of the said messuages, cottages, farms, lands, tenements, and hereditaments at Pisford aforesaid, and who, by his last will and testament, devised the same to my first wife Lydia, formerly Lydia Balls, spinster, who was the mother of my daughter, Edith Berry, and which estate and premises descended to and became vested in my late son, William Garlick, as the only son and heir-at-law of my said late wife Lydia, and which said premises he my said son William Garlick, devised to me in fee simple.*"

On the death of Anthony Garlick of Greetham, in 1840, William Hull of Fakenham became entitled to the estate in question, as heir-at-law of William Hull of Pisford, and died a few months afterwards.

The question for the opinion of the Court is, whether the said William Hull, of Fakenham, under the devise of Thomas Garlick, took an estate in fee, or for his own life only. If the Court should think that he took an estate in fee, judgment is to be entered for the plaintiff; but if the Court should be of opinion that he took an estate for life only, judgment is to be entered for the defendant.

The case was argued in Hilary Term last, (Jan. 27), by

Chilton, for the plaintiff.—It is impossible to doubt that the *intention* of the testator was to give an estate in fee to

William Hull of Fakenham; the only question is, whether he has used words which enable the Court to carry that intention into effect. The rule of law applicable to this case is thus stated by Sir James Wigram, in his work on the Interpretation of Wills (Proposition 5):—"For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed on the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will." In *Doe v. Allen* (a), Lord *Kenyon* cites and concurs in the observation of Lord *Mansfield* in *Right v. Sidebotham* (b), that, "in almost every case where by law a general devise of lands is reduced to an estate for life, the intention of the testator is thwarted, for ordinary people do not distinguish between real and personal property." So, in *Bowen v. Scowcroft* (c), *Alderson*, B., says, that, "in nine cases out of ten, as to personal estate, the construction is according to the testator's intention; but the contrary with regard to real estate." In *Smith v. Coffin* (d), on the other hand, (which is adopted as an authority in *Wilce v. Wilce* (e)), *Buller*, J., says, that "the question must always be, what was the intention of the testator; that is the polar star by which we must be guided." [*Parke*, B.—These difficulties have arisen from confounding the testator's *intention* with his *meaning*. *Intention* may mean what the testator intended *to have done*; whereas the only question, in the construction of wills, is on the *meaning* of the

1845.
DOE
d.
SAMS
v.
GARLICK.

(a) 8 T. R. 497.

(d) 2 H. Bl. 444.

(b) Dougl. 759.

(e) 7 Bing. 664.

(c) 2 Y. & Coll. 654.

1845.
 {
 DOR
 d.
 SAMS
 v.
 GARLICK.

words.] In this case it is clear, that if the words had been "to the heir or heirs-at-law of William Hull," instead of "to such person or persons as at the time of my decease shall be the heir or heirs-at-law of William Hull," that would have been sufficient to carry the fee. It is important, also, to consider, that in the introductory clause of the will the testator shews a clear intention to dispose of the whole of his property; for he says, "As to my estate, both real and personal, I dispose thereof in manner following," indicating plainly his intention not to die intestate as to any part: *Ibbotson v. Beckwith* (a); *Cole v. Rawlinson* (b). Further, he appears to have known how to limit an estate for life by express words, when he intended to give no more: e. g. to Anthony Garlick, who would be his heir-at-law in failure of issue of his daughter. And, with respect to the terms of this particular devise, Mr. Powell observes (c): "It seems, according to the early authorities, that a devise to the heir of a person, as purchaser, (the ancestor taking no estate of freehold), vests in such heir an estate in fee simple, without any words of limitation, inasmuch as the term 'heir' includes all the heirs of such heir:" for which he cites *Dardant v. Burchet* (d), where *Pollexfen*, C. J., assigns as the reason for this opinion, that "'heir' is nomen collectivum; and it is all one to say 'heirs of J. S.,' as to say 'heir of J. S., and heirs of that heir,' for every particular heir is in the loins of the ancestor, and parcel of him." [*Alderson*, B.—It does not appear here that the ancestor is dead. *Parke*, B.—The demise here is to the person who shall fill the character of heir of William Hull at the testator's death. It is just the same as if, having ascertained who he is, you were to write his name in the will.]

Secondly, this devise may be read as if the words in the

(a) Cas. temp. Talbot, 157.

(b) 1 Salk. 234.

(c) 2 Powell on Devises, 595.

(d) Skin. 205.

latter clause of the will, beginning "who was formerly the owner," down to the words "devised to me," were included in a parenthesis; and then there is an absolute devise of the fee simple.

Lastly, the devise being indefinite, and the lands being charged with an annuity to the testator's widow, the devise ought therefore to be construed to give an estate in fee. *Peppercorn v. Peacock* (a) is strongly in point on this part of the case, and appears not to be distinguishable. Mr. Jarman indeed says (b), that "it is well settled, that, if a testator merely direct an annuity to be paid out of his lands, *without saying by whom*, the charge is inoperative to affect the construction of the devise of the land so charged." This opinion of the learned author was referred to and considered in *Peppercorn v. Peacock*, where a devise to A. of lands, "subject to the yearly payment of £150" to B., was held to pass a fee. There there was no direction to pay, nor any express charge on the person of the devisee. *Andrew v. Southouse* (c), *Doe d. Palmer v. Richards* (d), *Doe d. Stevens v. Snelling* (e), and *Gully v. Bishop of Exeter* (f) are also authorities in support of this view of the case. [Parke, B.—The ground on which an estate for life is enlarged by implication to an estate in fee, is, that where there is a charge on the person of the devisee, it is presumed that it was intended that he should recoup himself, for which purpose he is to have the estate. It must be a *charge on the person in respect of the estate*. Here there is no charge on the person, but only on the estate. *Alderson*, B.—If the testator means the devisee to pay, of course he must have the estate to pay it out of. But here the estate is first charged, into whosoever hands it may come. *Pollock*, C. B., referred to *Doe d. Hanson v. Fyldes* (g).]

1845.
DOE
d.
SAMS
v.
GARLICK.

(a) 3 Man. & G. 356; 3 Scott, N. R., 651.

(b) 2 Powell on Dev. 392.

(c) 5 T. R. 292.

(d) 3 T. R. 356.

(e) 5 East, 87.

(f) 4 Bing. 290; 12 Moore, 591.

(g) Cowp. 833.

1845.
 {
 DOE
 d.
 SAMS
 v.
 GARLICK.

Mr. Jarman cites as authorities for his proposition the case of *Denn d. Miller v. Moor* (a) and *Fairfax v. Heron* (b). In the former case, there were no words charging the estate in the hands of the devisee. In the latter, the personal estate was sufficient to pay all the charges. The case of *Doe d. Clarke v. Clarke* (c) has been cited as overruling *Gully v. Bishop of Exeter*, but such is not the case. [Parke, B.—The reasons for the decision are not given in *Peppercorn v. Peacock*; probably the Court thought that the testator meant the devisee to pay, whether he were in funds or not, construing the words “subject to” as being that the devisee is subject to the charge, as similar words were construed in *Andrew v. Southouse*.] The words in *Andrew v. Southouse* were “charged and chargeable,” which can hardly be applied to the person of the devisee. [Alderson, B.—How can you say the devise is enlarged by the charge, when it is only given *out of the charged lands*? Where the devise is to a person, if he will subject himself to a charge, I can understand how that may enlarge the estate. It is on the ground of an *understood condition* that the principle rests. But this is an unconditional devise of the estate, charged with the annuity in whosoever hands it may be.]

The case was adjourned, that the Court might consider whether it was necessary to hear *Crompton*, who appeared to argue for the defendant; and now, without calling upon him, the Court gave judgment.

POLLOCK, C. B.—The question in this ejectment turns upon a devise in the will of Thomas Garlick. [His Lordship read the material parts of the will, and proceeded:] Unless the words “in fee simple,” at the close of the de-

(a) 5 T. R. 558; 6 T. R. 175;
 1 B. & P. 558; 2 Bos. & P. 247.

(b) Prec. in Ch. 67.
 (c) 1 C. & M. 39.

vise, can be considered as applicable to the estate given by the testator to "the person or persons who shall be the heir or heirs-at-law of William Hull," the case is that of a devise in general terms, without any words of limitation at all. It was contended, for the lessor of the plaintiff, that those words might be applied, as words of limitation, to the estate given to the heir or heirs-at-law of William Hull; and if by any reasonable construction we could have seen that they were meant so to be used, we should have had no reluctance in giving effect to that which we can hardly doubt was the intention of the testator, and in applying these words in order to carry that intention into effect. But it seems to me to be perfectly clear that a parenthesis ought not to be inserted in the manner suggested by Mr. *Chilton*; but that the words at the close of the devise, "in fee simple," belong entirely to the description of the estate given by the son, William Garlick, to his father,—“which he devised to me in fee simple.” The case is one, therefore, where the language used with reference to the immediate devise is without any words of limitation whatever. And the argument of Mr. *Chilton* was, first, that the words “such person or persons as, at the time of my decease, shall be the heir or heirs-at-law of William Hull,” imported that the heir or heirs-at-law of William Hull were to take in fee simple. But it appears to me that these words are nothing but the *designatio personæ*; and that, as soon as you have discovered the person answering that description, you are to insert his name, and then read the devise as if the name had been there originally.

The next question is, whether there is anything in this devise that will enable the Court to enlarge the estate beyond an estate for the life of the devise. Our attention was called to the circumstance that this is a devise charged with and subject to an annuity for life. But it is perfectly established that a charge upon the *estate*, and not upon the *person* of the devisee, will not enlarge the estate to a fee simple.

1845.
 }
 DOE
 d.
 SAMS
 v.
 GARLICK.

1845.

DOE
d.
SAMS
v.
GARLICK.

The case of *Gully v. The Bishop of Exeter* was relied upon in the argument; but since that decision there is the case of *Doe d. Clarke v. Clarke*, decided by Lord *Lyndhurst* in this court, and by which the case before Lord Chief Justice *Best* must be considered as overruled. It has been well observed, with reference to these cases, by the editor of a very learned work, Mr. Jarman, that although, undoubtedly, there are two cases which may be adduced, in which devises seeming to belong to this class were held to carry the fee, yet one of these cases professedly recognized, although it actually departed from, the principle which distinguishes between charges on the land merely, and charges on the devisee in respect of the land; and the other case, as I have said, must be considered as overruled. It appears most distinctly in the present case, that the charge is upon the estate, and therefore the devise is in fact a devise of the residue of the estate after the satisfaction of that charge. There are no words by which the Court can enlarge the estate, according to any case which was cited at the time of the argument, or any which we were able to find relating to the subject. It was pressed upon us, that there could be no doubt whatever what this testator intended; and, in order to satisfy the Court that he intended to give an estate in fee simple, it was suggested that he had himself mentioned, in the history of the estate coming into his family, a reason for giving it back again into the family of William Hull. But it is clear, both upon authority and principle, that the circumstance of the apparent *motive* by which a party is actuated, cannot be used to enlarge the sense of his words beyond the legal construction which is to be put upon them in the instrument. And I quite agree with what is said by Mr. Jarman, that if no one of these matters standing alone could enlarge that which would otherwise be an estate for life into an estate in fee, so neither can two or more of them, concurring together in the same instrument. Mr. Jarman truly remarks, that the rule of con-

struction with respect to this matter is entirely technical, and that in many instances the courts of law, while giving their judgment, have expressed an intimation that they were probably deviating from the real intention of the testator. But the object of all these rules is to create certainty, and to prevent litigation; to enable those who are conversant with these subjects to give such advice as may save the expense of litigation, by rendering the law certain, and not liable to fluctuation in each particular case. Acting upon these rules, and in accordance with the decided cases, it appears to me that the judgment of the Court, on the present occasion, ought to be for the defendant.

1845.
 }
 DON
 d.
 SAMS
 v.
 GARLICK.

PARKE, B.—I agree with the Lord Chief Baron, that the defendant is entitled to the judgment of the Court. The question arises on the will of the testator Thomas Garlick, and it is this—whether William Hull of Fakenham, who answered the description of the person who was at the time of the decease of the testator the heir-at-law of William Hull formerly of Pisford, took under that will an estate in fee simple or for life only. I am clearly of opinion that he took an estate for life only. The devise is—after subjecting the estate to the charge of an annuity in favour of the wife of the testator, and after certain life estates—a devise of the lands in question, “subject and charged as aforesaid,” that is, with the annuity, “to such person or persons as at the time of my decease shall be the heir or heirs-at-law of William Hull, formerly of Pisford aforesaid.” Now the question upon this part of the will simply is, whether or not there is anything to enlarge this indefinite estate, which must *primâ facie* be considered to be an estate for life, into a fee simple. Mr. *Chilton's* main argument was, that it was enlarged into a fee, because the estate was charged with an annuity. But I apprehend that the rule on that subject is settled beyond all question: it is laid down in very distinct terms by *Le Blanc, J.*, in *Doe d. Stevens v.*

1845.
 {
 DOE
 d.
 SAMS
 v.
 GARLICK.

Snelling, and has been recognized ever since. Whether it has in all cases been fully acted on, with reference to wills, is certainly a matter of doubt; there appear to be some cases, of which the case of *Gully v. The Bishop of Exeter* is one, in which the Court, while professing to act upon the rule of law, had perhaps in some degree departed from it. The rule itself, however, seems to be manifestly clear and settled beyond all doubt. *Le Blanc*, J., states it in these terms:—"According to all the determinations, the question whether the devisee takes a fee or not, in respect of charges," (that is, where there is a devise of an indefinite estate), "must depend on this, whether *he personally, or the estate given to him*, be charged with the payment of debts." It is the same with respect to any other charge. If the devisee be personally charged with payment of debts or legacies, or if they be charged upon the quantum of estate given to the devisee, he must take the fee; because, if he take for life only, he may be a loser, or the estate may be insufficient. Therefore the question in all the cases is, whether it is a charge upon the devisee personally, and he is directed to pay it, or it is charged upon the quantum of the estate given to him personally, in which case it is enlarged by the operation of that rule of law into a fee; or whether he merely takes an estate in the land already charged. Now I think it is clear beyond all question in this case, that the estate itself—the corpus of the estate—is charged with this annuity before it comes into the hands of the devisee, and therefore that this charge has no operation, according to that rule of law, to give an estate in fee to the heir-at-law of William Hull of Pisford.

But Mr. *Chillon* contended, that under the words of this devise, independently of the rule of law to which I have adverted, an estate in fee is given to William Hull of Fakenham, because he says there is authority that a devise to the heirs-at-law of A. will give a fee; and he refers to certain passages in Jarman on Wills, and to Powell on De-

vises, p. 595, for that doctrine. Admitting that to be so, I quite agree that the observation is inapplicable to the present case, because this is manifestly a devise to *a person or persons* who, at the time of the testator's death, shall be the heir or heirs-at-law. Then it was suggested by Mr. *Chilton*, (who did not, however, place much reliance on that argument), that, by reading the last sentence in a parenthesis, and treating the words "in fee simple" as applicable to this devise of the estate to William Hull of Fakenham, he would take in fee simple. That really is merely a question of grammatical construction; and I own it appears to me to be perfectly clear that this last clause is a mere recital of the estate which had previously been given to the testator by the will of his son; which "became vested in my late son, William Garlick, as the only son and heir-at-law of my said wife Lydia, and which premises he my said son, William Garlick, devised to me in fee simple." It seems to me to be quite clear that this is merely a recital of the estate that he had, and that it cannot be considered that he intended the words "in fee simple" to apply to the former part of the will, and therefore that they should be read parenthetically.

I am, therefore, clearly of opinion, upon the whole case, that an estate for life only passed to William Hull, and that our judgment must be in favour of the defendant.

ALDERSON, B.—I am of the same opinion. All that the testator bequeaths is *the estate charged*. Now, if the bequest be of an estate charged, the authorities which have been referred to by the Lord Chief Baron and my Brother *Parke* shew that that of itself will not carry the fee. Then the next question is, to whom does the testator devise the estate charged? He devises it, after the death of his daughter, who died without leaving any issue, and after the death of his nephew, to whom it had been given for

1845.
 }
 DOE
 d.
 SAMS
 v.
 GARLICK.

1845.
 {
 Doe
 d.
 Sams
 v.
 Garlick.

life, "subject as aforesaid," that is, to the same charges, "to such person or persons who at the time of my decease shall be the heir or heirs-at-law of William Hull, formerly of Pisford." Now, undoubtedly, if the bequest had been merely "to the heir or heirs-at-law of William Hull, formerly of Pisford," the authorities to which we were referred would have been strong to shew that the word *heirs* would not only designate the person to whom the estate was to go, but would also contain a limitation to them in fee; being to be construed in the double sense, according to the rule given in the case in *Skinner*, 205, which was cited in the course of the argument. But here the testator speaks of *the person who*, at the time of his decease, shall be the heir; the word "heir" being merely the description of the individual, and not extending to a limitation of the estate. It seems to me, therefore, that the person who was thus designated took the estate without any words of inheritance, and consequently had only an estate for life. Then the only remaining question is, whether we can add to this devise the concluding words, "in fee simple." That would be to act entirely upon the supposed idea of the testator's intention, and for that purpose to do very great violence to the words: and I think it would be very wrong so to construe these words, which I have no doubt were not meant in that sense, in order to effectuate a supposed intention of the testator with respect to another part of the will.

Judgment for the defendant.

1845.

MEARING v. HELINGS.

Nov. 6.

ASSUMPSIT for money had and received, to which the defendant pleaded non assumpsit, and also two special pleas setting up as a defence (in substance) that the money claimed in the action was received by the defendant upon a contract for an illegal lottery, contrary to the stats. 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119 (a). At the trial, before *Pollock*, C. B., at the sittings in Middlesex after last Trinity Term, it appeared that the action was brought to recover from the defendant, who was the treasurer and stakeholder of a "Derby sweep," or lottery on the result of the Epsom Derby stakes, 1844, the sum of 13*l.* 6*s.*, the amount which, by the rules of the "Sweep," was to be paid to the person who should be the drawer of the second horse. The plaintiff drew a horse called "Ionian," which actually came in third in the race; but the winner, "Running Rein," was subsequently declared by the stewards to be disqualified, as being four instead of three years old, and "Ionian" thus became the second horse in the race. The plaintiff, by his particulars, claimed "the sum of 13*l.* 6*s.*, for money received by the defendant, as the treasurer of a certain club, for the use of the plaintiff as the drawer of the second horse in the Derby stakes, according to the rules of the said club." The Lord Chief Baron directed a verdict for the defendant on the second and third issues, on the ground that this was an illegal lottery; but it was contended for the plaintiff, that he was at all events entitled to recover back his own stake, which was £2. His Lordship thought that the particulars were not sufficient for that purpose, but reserved the point, and a verdict was taken for the defend-

The plaintiff's particulars, in an action for money had and received, stated, that the action was brought to recover "the sum of 13*l.* 6*s.*, for money received by the defendant as the treasurer of a club, for the use of the plaintiff as the drawer of the second horse in the Derby stakes, according to the rules of the said club. The defendant pleaded, that the money was subscribed to an illegal lottery; and it was therefore held, that the plaintiff could not recover the 13*l.* 6*s.* :—*Held*, that he could not, under these particulars, recover back his own stake of £2.

Quere, whether, where a party claims, as winner, the whole of the stakes deposited on an illegal wager, he can recover back his own stake as money received to his use by the stakeholder.

(a) See *Alport v. Nutt*, 14 Law J., N. S., C. P., 272.

1845.
 MEARING
 v.
 ELLINGS.

ant, with leave to the plaintiff to move to enter a verdict for him for £2 on the first issue.

Humfrey now moved accordingly.—The plaintiff was entitled to recover back his own subscription, for he had a right to disaffirm the illegal contract at any time: *Hastelow v. Jackson* (a). [*Parke*, B.—That is, if the particulars allow him.] The money claimed by the particulars includes the plaintiff's own stake. [*Parke*, B.—The particulars are to inform the defendant what the plaintiff is going for. If he had said that he sought to recover the £2, the defendant would probably have paid it into court. *Pollock*, C. B.—No sum of £2 is mentioned or pointed at in them.] They give the defendant notice that all is demanded which the plaintiff can legally recover. [*Parke*, B.—*Davenport v. Davies* (b) is precisely in point against you. There the particulars stated that the action was brought to recover £13, “viz. £11 deposited by the plaintiff, and £2 by one Roberts, in the hands of the defendant as a stakeholder, and won of the said Roberts by the plaintiff.” and it was held that under these particulars the plaintiff could not recover his own stake. *Alderson*, B.—Who could conjecture that under this particular the plaintiff was going for his own stake?] So it might have been said in *Hastelow v. Jackson*. [*Alderson*, B.—I accede to the authority of that case, although I think it a very strong decision. It does not convince me; it overcomes me. *Parke*, B.—It is difficult to say the party can recover back his own stake, unless he intimate that he means to do so. Here, however, the case is quite clear; the plaintiff has misled the defendant by the form of his particulars.]

POLLOCK, C. B.—There will be no rule. The plaintiff is

(a) 8 B. & C. 221.

(b) 1 M. & W. 570.

precluded by the form of his particulars. With respect to the case of *Hastelow v. Jackson*, I forbear saying anything upon it at present; it is binding upon us until reviewed in a Court of error. If the same question arose before me, I should certainly advise a bill of exceptions.

1845.
MEARING
v.
HELLINGS.

The rest of the Court concurring,

Rule refused.

DICKINSON v. MARROW and Others.

Nov. 14.

DEBT for money had and received, for interest, and on an account stated.—Pleas, non assumpsit, set-off, and payment; and issues thereon. The particulars of demand claimed the sum of 1042*l.* 17*s.*, being the balance due to the plaintiff of the proceeds of 300 lasts of wheat sold by the defendants in the year 1844, and also interest on such balance, at the rate of 5 per cent. per annum, from the 21st of September, 1844. The particulars of set-off were for sums paid for insurance, freight, &c.; and amongst them was the following item:—"Cash transferred to Mr. James Scarth by your order, 1042*l.* 17*s.*"

The plaintiff, a merchant at Sunderland, having given an order to B. & Co., at Dantzic, for a cargo of wheat, wrote to request that B. & Co. would hold it at the disposal of the defendants, merchants of Liverpool, who would lodge the necessary credits for the remaining balance, and communicated this to the defendants. A few days afterwards, and before the wheat was shipped from

At the trial, before *Wightman, J.*, at the last spring assizes at Liverpool, it appeared that the action was brought by the plaintiff, a merchant carrying on business at Sunderland under the firm of John Dickinson & Co., to re-

Dantzic, the plaintiff wrote to the defendants as follows:—"We request you will account to Mr. J. S., of Newcastle, for the proceeds of the wheat we have consigned to you, lying at Dantzic, in Messrs. B.'s possession, which we wrote about to you a few days ago." The defendants assented to this order, and informed S. (who was largely indebted to them) that they held the wheat to his account; and on its arrival, they rendered accounts of the sale of it to S., and placed the balance of the proceeds to the credit of his account with them:—*Held*, that the plaintiff's order to account to S. was an order transferring the proceeds to him, and not a mere order to pay to him, and was not revocable after the defendants had acted upon it.

1845.
DICKINSON
v.
MARROW.

this is correct, please observe this, that the net proceeds are to be remitted to us, and all other necessary documents. You will also say, by return of post, if you have advanced any money to Mr. Scarth upon this grain, and how much; or, when you do so, let us know.

“So soon as the cargo arrives, please to write us immediately; but should you have an offer in the meantime, leaving us a small profit, be sure to let us know.”

On the 16th of May the defendants wrote to the plaintiff, inclosing a statement of the charges on the shipping of the wheat at Dantzic, and advising him that they had effected insurance on the cargo, &c.; and stating also that they had received his letter of the 4th of May, a copy of which they had handed to Scarth, with a request that he would see the plaintiff on the subject. On the 27th of May the plaintiff wrote to the defendants, as follows:—

“Dear Sirs,—We are not at all satisfied with your answer regarding our wheat. We beg, therefore, a distinct answer to ours of the 4th instant, and shall hold you liable for any irregularity with Mr. Scarth. You will do nothing without our orders.”

On the 29th of May the defendants replied as follows:—

“Gentlemen,—In reply to your favour of 27th instant, we beg to refer you to our letter of the 19th ultimo, and to inform you, that, having signified to Mr. James Scarth, that, in compliance with your order of transfer, we held proceeds of the Dantzic wheat for his account, and having since acted in conformity, we do not see how at present we can alter our position.”

The wheat arrived at Liverpool from Dantzic on the 4th of June, and was sold at different periods by the defendants, and account sales were rendered by them to Scarth; the net proceeds amounting to 1042*l.* 17*s.*, which the de-

defendants placed to the credit of Scarth's account with them in respect of other transactions, on which he owed them, during the whole of the period covered by the above correspondence, a large balance. On the 7th of June, Scarth, at the plaintiff's request, wrote a letter to the defendants, to the following effect:—"Messrs. J. Dickinson & Co. having informed me that you wish me to state to you that I have no claim on them for the cargo of the *Dantzic* or otherwise, I have no hesitation in doing so, more especially as it will unfortunately have to be the reverse, as some grain which should have been sent to them has not come forward. I shall be pleased to find that you and said friends can settle matters satisfactorily." To this letter the defendants replied, refusing to recognize this disclaimer, and stating that they considered the order in his (Scarth's) favour from the plaintiff, upon the faith of which they had acted, as a binding transfer of the property, upon which they had a security for their general balance of account with him.

Scarth shortly afterwards became wholly insolvent; and the defendants having refused to pay over to the plaintiff the net proceeds of the wheat, on the ground that the plaintiff's letter of the 17th of April operated as a binding transfer to Scarth of the property in the wheat, and entitled them to hold the proceeds as a security for their general balance of account with him, the present action was brought.

The same ground of defence was set up on behalf of the defendants at the trial. For the plaintiff it was answered, that his letter of the 17th of April operated only as a bare authority to account to Scarth for the proceeds when received, which was revocable, and was in fact revoked before the arrival of the wheat by the letters of the 4th and 27th of May. The learned Judge thought that the transaction amounted to a transfer of the property to Scarth,

1845.
 Dickinson
 v.
 Marrow.

1845.
 {
 DICKINSON
 v.
 MARROW.

and that the defendants were entitled to a verdict. He offered, however, to leave the question to the jury; but this not being required by the plaintiff's counsel, his Lordship directed a verdict for the defendants on the first issue, with liberty to the plaintiff to move to enter a verdict for him for 1042*l.* 17*s.* and interest, if the Court should be of opinion that the authority given by the letter of the 17th of April was revocable.

In Easter Term, *Watson* obtained a rule nisi accordingly; against which

Martin (*Crompton* with him) now shewed cause.—The letter of the 17th of April operated, not as a simple *mandate* from principal to agent, revocable at any time until executed, as was contended for the plaintiff, but as a transfer to the defendants of the balance of the proceeds of the cargo, to be held by them against Scarth's debt. There can be no doubt that, if A. owes B. a debt, and C. transfers property of his to B. as a security for A.'s debt, that is a valid transaction in law. The debt between A. and B. is a sufficient consideration: *Walker v. Rostron* (a). This is in substance the same transaction, except that here the party holding the goods combines in himself the character of creditor and of the person who receives the order. The same doctrine is laid down in *Bailey v. Culverwell* (b), and in *Hutchinson v. Heyworth* (c), where all the authorities are referred to. [*Parke, B.*—The only question is, whether this is a simple mandate to pay to Scarth, or a transfer of the debt: if it be the latter, the debt is paid. Why should a man at Sunderland send a mandate to a house at Liverpool, to pay the proceeds to a man at Newcastle? And the defendants' answer of the 19th of April

(a) 9 M. & W. 411.

(b) 8 B. & Cr. 448.

(c) 9 Ad. & Ell. 107; 1 P. & D. 266.

informed the plaintiff that they understood it as a transfer of the debt.]—The Court then called on

1845.
 }
 DICKINSON
 v.
 MARROW.

Watson and Tomlinson, in support of the rule.—The relation of principal and agent existed between the plaintiff at Sunderland and the defendants at Liverpool. The defendants were to receive the cargo, and transmit the proceeds to the plaintiff. While the vessel was on its voyage, this order was given, which the plaintiff contends was not a transfer of the proceeds of the cargo, which had not then arrived, but simply an order to pay them to Scarth, (who had been employed as the plaintiff's agent to procure the cargo), instead of to the plaintiff himself. It is clear that the defendants considered their agency as continuing notwithstanding; they effected insurance and paid the charges, and advised the plaintiff of their having done so. The terms of the letter do not import a transfer of the proceeds: the plaintiff does not tell the defendants to hold them for Scarth, but merely to account to him, that is, to pay over the proceeds to him, instead of to the plaintiff.

POLLOCK, C. B.—The simple question is, whether this was an equitable assignment of the proceeds of the cargo, or a mere order to pay them over to Scarth. If it was a mere order to pay, it was revoked: if it was an equitable assignment, the revocation did not operate. Upon the construction of the letter itself, it seems to me that it clearly amounted to a transfer of the cargo; and the letter of the 4th of May shews as clearly that the plaintiff so understood it, for he admits it to be a transfer order to a certain extent. I think it must operate to the whole extent.

PARKE, B.—I am entirely of the same opinion. The simple question is, whether this was a mere order to pay, or what has been called a transfer order; and I think that, on the letter of the 17th of April itself, and particularly when

1845.
 DICKINSON
 v.
 MARROW.

coupled with that of the 4th of May, it is clear that it was an order transferring the debt. It is the same as if the plaintiff had said, "We have assigned the cargo to Scarth, and you are to account with him instead of with us." Then the question is, whether this equitable assignment was acted upon, and the defendants' evidence shewed clearly that it was.

ALDERSON, B.—I am of the same opinion. This was, no doubt, a question for the jury, if Mr. *Watson* had desired that they should pass their judgment upon it; but they could not hesitate a moment about it, because the plaintiff has put his own construction on his own letter, and has construed it so as to give a verdict to the defendants.

ROLFE, B., concurred.

Rule discharged.

Nov. 18. In re BARBER, Gent., ex parte the MANCHESTER and LEEDS RAILWAY COMPANY, and the other Rate-payers of the Township of Rastrick.

Semble, that, under the Attorneys and Solicitors Act, (6 & 7 Vict. c. 73, s. 37), all the common-law courts therein mentioned have a common jurisdiction to refer for taxation an attorney's bill for business done in any of them.

THIS was a rule calling upon Mr. Barber, an attorney of this court, to shew cause why his bill of costs should not be referred to the Master for taxation. Mr. Barber had been employed by the surveyor of the highways of the township of Rastrick, to prefer and conduct an indictment for an obstruction of one of the highways, and to transact other business, (not in this court), his charges for which amounted

Where a surveyor of highways within a parish employed an attorney to conduct an indictment for an obstruction of one of the highways, and to transact other business, and paid his bill out of the monies raised by the highway rate—*Held*, that the rate-payers were not persons "liable to pay," within the meaning of the stat. 6 & 7 Vict. c. 73, s. 38, and could not, therefore, apply for a reference of the bill to taxation.

in the whole to 760*l.* 8*s.* 4*d.*, of which 525*l.* 14*s.* 8*d.* had been paid to him. The present application was made on behalf of the railway company and the major part of the other rate-payers of the township of Rastrick; a rate having been made therein, under the stat. 5 Will. 4, c. 50, s. 27, for the payment (inter alia) of the bill in question. A similar application had been first made to Coleridge, J., at Chambers, and refused on the ground that the rate-payers were not persons "liable to pay" the bill, within the meaning of the stat. 6 & 7 Vict. c. 73, s. 38, and therefore not competent to make application for a reference of the bill to taxation.

1845.
In re
BARBER.

Martin and *Addison* now shewed cause against the rule.—There are two answers to this application. In the first place, this Court has no authority to refer to taxation an attorney's bill for business done on the Crown side of the Court of Queen's Bench. That question depends on the construction of the 37th section of the Attorneys and Solicitors Act, (6 & 7 Vict. c. 73), which provides, that "it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other Court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of law or equity, for the Lord High Chancellor or the Master of the Rolls; or, in case any part of such business shall have been transacted in any other Court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any Judge of either of them, and they are hereby respectively required to refer such bill, on the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the court in which such reference shall be made." The word "respectively" seems to shew that the taxation is to

1845.
In re
BARBER.

take place in the court in which the business, or some part of it, was done. It can hardly be supposed that it was intended, for instance, to give the Court of Pleas at Durham power to tax a bill for business done in this court. [*Parke, B.*—That clause is founded upon the 23rd section of the 2 Geo. 2, c. 23, which confined the power of taxation to the Court in which the *greater part* of the business was done. In practice, however, the power was exercised by the Court in which any part of it was done. Now the present statute drops those words, which shews, I think, that the Legislature meant to give a common jurisdiction to all the Courts therein mentioned.] It may only mean to provide expressly that it shall not be necessary to inquire into the *amount* done in the particular court.

But, secondly, the rate-payers of the township are not persons entitled to apply for a taxation of this bill. The 38th section of the statute enacts, “that where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall *be liable to pay* or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the parties chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party chargeable with such bill as aforesaid.” The rate-payers are not persons “liable to pay” the bill, within the meaning of this section. The surveyor is the client of the attorney, and they levy a rate for the payment of it. It is a personal contract of the surveyor, although he is, by the concurrence of the majority of the rate-payers, to be reimbursed by a rate levied on the whole of them. [*Rolfe, B.*—The rate-payers are to

contribute by a rate to a fund, which, in the hands of another person, is to be applied to the payment of the bill.] Or rather, to contribute to a fund for his reimbursement. The 39th section expressly provides for the case of a cestui que trust, thereby excluding other cases, such as the present. These parties are liable to pay the *rate*, but not to pay the attorney's bill; and, under the 105th section of the Highway Act, (5 & 6 Will. 4, c. 50), there is an appeal to the justices in sessions against the allowance of the surveyor's accounts, so that there is an adequate check against improper expenditure of this nature.

1845.
In re
BARBER.

Knowles and *Hoggins*, in support of the rule, were desired to address themselves to the latter point.—The rate-payers are persons "liable to pay" the bill, within the meaning of the 38th section. The object of this act undoubtedly was to render the taxation of attornies' bills more easy and general. The 37th section gives the right of applying for a taxation to the persons *chargeable by* the bill, and their representatives and assignees, meaning thereby the parties *legally liable* to pay it. Then the 38th section, for the protection of parties not directly chargeable, extends the same right to all persons who shall be liable to pay or shall have paid the bill; that is, construing the clause reasonably, to all persons who are ultimately to be charged for the purpose of paying it. Here the rate-payers are bound to contribute to form a fund, out of which the party legally chargeable is to pay the bill. It is their money which pays it, and they are the persons who have really an interest in the taxation. [*Rolfe*, B.—Is each of them to tax toties quoties?] No; a taxation at the instance of one would enure for the benefit of all. [*Pollock*, C. B.—Then a single rate-payer might, by collusion, procure a taxation of the bill, although all the others might be willing to pay it.] On the other hand, there may be collusion between the surveyor and the at-

1845.
In re
BARNER.

torney, to the great prejudice of the rate-payers. A mortgagor has been held entitled to tax a bill of costs supplied to his mortgagee: *In re Carew* (a).

POLLOCK, C. B.—I think this rule ought to be discharged. The question, whether this bill is the subject of taxation in this Court, does not necessarily arise, and I give no opinion upon it. But it is contended that, under the 38th or 39th section of this act of Parliament, the 6 & 7 Vict. c. 73, a taxation of this bill ought to be directed. The 38th section is in these terms: [His Lordship read it.] The case of *In re Carew*, which has been cited, where an attorney's bill of costs was taxed on the application of a mortgagor, shews that that is one instance (and no doubt there are several others) to which that section applies. The 39th section applies only to the case of trustees and their cestuis que trust. The question, therefore, really is, whether a person, who contributes as a rate-payer to a fund out of which an attorney's bill is to be paid, is within the provisions of the 38th section, as being a person not the party chargeable with the bill, but liable to pay the same to the attorney or to the party chargeable with it. It appears to me, that such a case cannot be said to be within either the language or the spirit of this enactment. It is certainly not within the words; for the rate-payer is not liable to pay the bill, but only to pay a rate out of which the bill may by possibility be paid. And with respect to the spirit of the act, I cannot think that it could have been intended to give persons who have only such a species of interest in the payment of the bill as this, a right to have it taxed, in the absence of any special provision for that purpose, and of any mode of carrying it out. In truth, there are other means provided by law, by which the rate-payers may be protected against misconduct in the

(a) 14 Law J., N. S., Chanc., 100.

persons entrusted with the administration of the affairs of the parish; namely, by application to the magistrates, who have to settle and allow the accounts of the surveyors. The violation of their duty by those whose business it is to take care of the interests of the rate-payers is not to be presumed; but, if they do so violate their duty, their default cannot be supplied by this Court, where the act of Parliament contains no words that enable it to do so.

For these reasons, I concur in the view of this case which was taken by my Brother *Coleridge*, and think this rule ought to be discharged.

PARKER, B.—I entirely agree in the view of this case which has been taken by the Lord Chief Baron. It is not necessary on the present occasion to say whether this Court has the power, under the 37th section of this act, to order a taxation of this bill; though I am strongly of opinion that it has, and that a common jurisdiction is given by that section to all the common-law courts. But, upon the other point, I think my Brother *Coleridge* has put a right construction on the 38th section. This is a mixed fund in the hands of the surveyor, consisting partly of the contributions of the rate-payers already in his hands, and partly of the rates which he is empowered to make under the 5 & 6 Will. 4, c. 50, s. 27, and out of which he is to pay, not only the attorney's bill, but also other expenses, penalties, and forfeitures which may be payable out of it. He is, however, the party liable to the attorney for his bill, and the rate-payers are not in any sense persons liable to pay it, within the meaning of sect. 38.

ALDERSON, B.—I am of the same opinion. I think a rate-payer is not one of those persons who either has paid or is liable to pay the bill, either to the attorney or the surveyor. That he is not liable to pay the attorney is too clear for argument. Neither is he liable to pay it to the

1845.
In re
BARBER.

1845.
In re
BARBER.

surveyor, until it has been allowed in his accounts by the justices. Nor is the rate-payer without remedy in case of any abuse; for it is his duty to apply to the justices when the surveyor is passing his accounts, and if a proper case be made out, the justices will no doubt discharge their duty, and call upon the surveyor either to shew that he has taxed the attorney's bill, or to satisfy them that it did not require taxation. No difficulty can arise if the magistrates do their duty, and we will not presume the contrary.

ROLFE, B.—I am of the same opinion. It struck me at first sight that this Court had no authority to order the taxation of a bill for business done in another of the common-law courts; but, upon further consideration, and after hearing what has been thrown out by my Brother *Parke*, I am disposed to concur with him on that point. But I am clearly of opinion that this bill cannot be taxed on the application of these parties. The 27th section of the 5 & 6 Will. 4, c. 50, is that which enables the surveyor to make a rate, which is the fund wherewith he is to discharge his duties. Then it is said that the rate-payers are interested in the whole of this fund. But how is their interest provided for? By the 44th section, which provides that, "within fourteen days after the election or appointment of the surveyor, the accounts made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all monies received or disbursed by virtue of this act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appointment of surveyor as herein directed, the said accounts shall be signed by the surveyor, &c. for the year preceding, and laid before the justices of the peace at a special sessions for the highways, holden at the place

nearest to the parish or district for which such surveyor shall have been appointed, and such justices are hereby authorized and required to examine him as to the truth of the said accounts, or of any charge contained therein: provided always, that, if any person chargeable to the rate authorized to be made by this act has any complaint against such accounts, or the application of the monies received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid, and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." Now, if a proper case be made out, shewing that the surveyor has paid, or is about to pay an attorney's bill without submitting it to the proper taxation, the magistrates might say to the surveyor that they would not pass it unless it were taxed, and some person were present on the part of the rate-payers to see that justice was done. That course would prevent any difficulty; but the doctrine contended for to-day would lead to difficulties insurmountable. Besides that suggested by my Brother *Parke*, that this is a mixed fund in the hands of the surveyor, applicable to various purposes, it is also composed partly of the balance of the preceding year, and, for aught we know, that balance might be sufficient for the payment of the bill.

1845.
In re
BARBER.

Rule discharged, with costs.

1845.

Nov. 18.

EMERY v. RICHARDS.

A wager of less than £10 on a foot-race to be run for a sum under £10, before the stat. 8 & 9 Vict. c. 108, s. 18, was legal and valid, and neither of the betters could recover back his stake from the stakeholder before the determination of the event.

ASSUMPSIT for money had and received.—Plea, non assumpsit.

At the trial, before the under-sheriff of Staffordshire, it appeared that the action was brought to recover from the defendant the sum of 10s., being the stake deposited in his hands by the plaintiff, to abide the event of a wager upon a foot-race to be run for the sum of £5. The plaintiff had demanded back his stake before bringing the action. The under-sheriff ruled that the race was an illegal game, and under his direction the plaintiff had a verdict for 10s.

Hance having obtained a rule nisi for a new trial, on the ground of misdirection,

Martin now shewed cause.—The ruling of the under-sheriff was correct, for this race was an illegal game within the stat. 9 Ann. c. 14, s. 1. The effect of that statute is not merely to avoid securities given for money lost at gaming or betting on the games therein mentioned, but to avoid the contract, and therefore to entitle the loser to recover back the money lost by him upon such games: and its operation is not confined to cases where the sum amounts to £10. The statute was held, in *Applegarth v. Colley* (a), to apply to all the games mentioned in the 16 Car. 2, c. 7.—He cited also *Bentinck v. Connop* (b).

Hance, contra.—*Applegarth v. Colley* is directly in point for the defendant. It was there held that the 1st section of the statute of Anne did not apply, unless the gaming was *as credit*; nor the 2nd, unless to *excessive* or *fraudu-*

(a) 10 M. & W. 723.

(b) 2 Q. B. 693.

lent gaming; whereas in that case nobody lost the sum of £10. [*Pollock*, C. B., referred to *Bate v. Cartwright* (a).]

1845.
EMERY
v.
RICHARDS.

POLLOCK, C. B.—The rule for a new trial must be absolute. This is a bet on a foot-race for a sum under £10, which is perfectly legal. If so, according to the decision of this Court in *Applegarth v. Colley*, the contract is valid, and the plaintiff has therefore no right to recover back his stake, but must wait the event. In *M'Alister v. Haden*(b), it was held that an action lay upon a wager on a horse-race, if neither of the sums betted by the parties amounted to £10, the race itself being run for a sum of £50 and upwards.

PARKE, B.—I am of the same opinion. The point has been already decided by the case of *Applegarth v. Colley*. This is not gaming on ticket, because here the money was parted with, nor is it excessive gaming within the meaning of the statute. If so, the transaction was valid, and the contract binding; and therefore one of the parties cannot determine it by a simple countermand, without the consent of all the other parties depositing.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute (c).

(a) 7 Price, 540.
(b) 2 Campb. 438.

(c) See now the stat. 8 & 9 Vict.
c. 108, s. 18.

1845.

Nov. 5.

PHILLIPS v. WARREN.

A rule to discharge a rule absolute for a new trial on payment of costs, after demand and non-payment of the costs, is, in this court, a rule nisi, which makes itself absolute unless cause be shewn against it within the time limited.

IN this case a rule for a new trial was made absolute, in Trinity Vacation, on payment of costs. The costs were taxed, and the amount thereof demanded, but they had not yet been paid.

Hugh Hill now moved to discharge the rule for a new trial, and stated that the only question was whether the Court would grant the rule absolute in the first instance. In *Champion v. Griffiths* (a), upon a similar application, *Patteson*, J., granted a rule absolute in the first instance, observing, that if there were any reason for reviving or re-opening that rule, the party might apply to the Court for that purpose. There was no direct decision upon the matter in this court, but probably the practice of the Court of Queen's Bench would be adopted.

PER CURIAM.—The better way will be for you to take a rule nisi, which in this Court makes itself absolute unless cause be shewn against it within the time limited by the rule.

Rule accordingly.

(a) 1 Dowl. P. C., N. S., 319.

1845.

IN RE WHALLEY.

Nov. 17.

A RULE had been obtained, calling on an attorney to shew cause why an attachment should not issue against him for not delivering his bill of costs pursuant to a Judge's order.

Semble, that personal service, even of a rule for an attachment, may be dispensed with where there is no other remedy, and it is satisfactorily shewn that the party knows of the rule and is evading service of it.

Huddleston now moved to make the rule absolute.—It appeared from his affidavit that the rule had not been personally served, but facts were stated from which, as he contended, it appeared that the attorney knew of the rule having been obtained, and was keeping out of the way to avoid service of it; and it was urged that, although the Court of Common Pleas, in *Wilkinson v. Pennington* (a), and the Court of Queen's Bench, in the case *In re Pyne* (b), had gone so far as to say that they would not dispense with personal service of a rule for an attachment, even though the party was an attorney of the court, the cases in this Court had not gone to that length. In the case *In re Barwick* (c), a rule was made absolute against an executor for an attachment for not accounting pursuant to rule of court, although it had not been personally served, it being satisfactorily shewn that the party kept out of the way to avoid service. A similar course was pursued in the case *In re Fennell* (d). The correct principle was laid down in *Richmond v. Parkinson* (e), namely, that personal service would not be dispensed with where there was any other remedy. Now in this case the only remedy was by attachment.

PARKE, B.—I do not think it has ever been expressly

(a) 5 Scott, 401; 6 Dowl. P. C. 183.

(b) 1 D. & L. 703.

(c) 3 Dowl. P. C. 703.

(d) Id., n. (a).

(e) Id. 703.

1845.
 In re
 WHALLEY.

laid down, that under no circumstances will the Court dispense with personal service of such a rule. Where there is no other remedy for the recovery of a debt but by attachment, and the Court is satisfied that the party is avoiding service, I am not prepared to say that in such a case the Court would insist on personal service.

The Court then desired to hear the affidavit, which stated that the deponent had called at the attorney's residence to serve the rule, and his belief, from circumstances which were set forth, that the attorney was in the house at the time; but it did not appear that he had been seen there. The deponent subsequently called at his office, and there left a copy of the rule with his brother, who returned it the next day, with an intimation that he declined to deliver it, and that the service must be effected in the regular way.

The Court thought that some further attempt should be made to serve the party personally; and, it appearing that this rule had expired, they granted a fresh rule to shew cause; intimating that, on any future application to the Court, what had already been done might be used in aid (a).

Rule accordingly.

(a) Personal service was subsequently effected, so that any further application to the Court became unnecessary.

BARTLETT v. BENSON.

Nov. 18.

ASSUMPSIT by indorsee against indorser of a bill of exchange.—The declaration stated, that one Tempest, on the 27th day of February, 1840, made his bill of exchange in writing, and directed the same to Messrs. Glyn & Co., and thereby required them to pay to the order of the defendant £200 two months after the date thereof; that the defendant indorsed the bill to the plaintiff, and that Messrs. Glyn & Co. did not pay the bill, although it was duly presented to them for payment, of which the defendant had notice, &c.

The defendant pleaded, first, that he did not make the bill, on which issue was joined; secondly, that, after the indorsing of the said bill by the defendant to the plaintiff, and before it became due, to wit, on &c., the plaintiff, then being the holder and owner of the said bill, indorsed the same to some person unknown, who presented it to Messrs. Glyn & Co. for acceptance; that the said Messrs. Glyn & Co. refused to accept the same; and, although a reasonable time for the defendant to have had notice of the said presentment and dishonour elapsed after the said presentment and dishonour in this plea aforesaid, and before the defendant had and received the notice in the declaration mentioned, yet the defendant had not due notice of the said presentment and dishonour.—Verification.

The third plea was similar to the second, except that it stated, that after the plaintiff had indorsed the bill to some person unknown, that person indorsed it to some other person unknown, who presented it to Glyn & Co. for acceptance, &c.

Replication to the second and third pleas, *de injuriâ*.

At the trial, before *Pollock*, B., at the sittings in Middlesex after last Easter Term, the defendant obtained a verdict on the second and third issues. In Trinity Term,

In an action by the indorsee of a bill of exchange drawn payable to the defendant or his order, and indorsed by the defendant to the plaintiff, the defendant pleaded, that, after the indorsement by him to the plaintiff, and before the bill became due, the plaintiff, being then the holder, indorsed it to a person unknown, who presented it to the drawee for acceptance; that the drawee refused to accept it; and that the defendant had no due notice of the dishonour for non-acceptance. The plaintiff replied, *de injuriâ*:—*Held*, on motion to enter judgment for the plaintiff, notwithstanding a verdict for the defendant on that issue, that the plea was a good answer to the declaration, inasmuch as it displaced the only title of the plaintiff alleged therein, viz. his title by indorsement from the defendant.

1845.
 BARTLETT
 v.
 BENSON.

Byles, Serjt., obtained a rule calling upon the defendant to shew cause why the judgment should not be entered for the plaintiff non obstante veredicto.

Dundas and *Addison* now shewed cause.—The second and third pleas afford a complete answer to this action. The plaintiff, in his declaration, relies upon his title to the bill *by indorsement from the defendant*. Then the pleas shew, that, after that title accrued to him, and before the bill became due, the plaintiff had indorsed it over to another person, who, while he was the holder, presented it for acceptance to the drawees, and that acceptance was refused, of which the defendant had not due notice. According to the authority of *Roscow v. Hardy* (a), that is a discharge to the defendant. In that case, the holder of a bill, before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who, not knowing of the laches, took up the bill; and it was held, that his ignorance, when he paid the bill, of the laches of the former holder, did not entitle him to recover against the first indorser, who set up that laches as a defence. That case is precisely in point for the defendant. Where, indeed, a party first takes the bill, after such laches, from the person who has been guilty of it, without notice of the laches, there it is admitted that prior indorsees are not discharged as against the party so taking it: *O'Keefe v. Dunn* (b). In that case, the Court admitted the authority of *Roscow v. Hardy*, and distinguished it. *Holroyd, J.*, says (c), “The case of *Roscow v. Hardy* differs from this, because there the plaintiff took up the bill of his own wrong, after the holder by his laches had discharged the drawee and prior indorsers; and therefore it

(a) 12 East, 434.

ror, 5 M. & Selw. 282.

(b) 6 Taunt. 305; S. C., in er-

(c) 5 M. & Selw. 290.

was properly holden that the plaintiff could not recover against a prior indorser." It may be assumed, therefore, that the Court will not depart from the decision in *Roscow v. Hardy*. Then the question comes merely to this, on which party it lay to aver the facts which might shew the present plaintiff to be within the decision in *O'Keefe v. Dunn*, and not within that in *Roscow v. Hardy*. Now, it is clear the *declaration* is founded upon the plaintiff's *original* title as indorsee of the defendant, and that the plea meets that title. Then the plaintiff must shew the facts which take him out of the predicament which belongs to him as standing on his original title. [*Pollock*, C. B.—You say that you aver facts which bring you within the law merchant, and that it is for the plaintiff to take you out of it. *Parke*, B.—The declaration is *primâ facie* founded on the title by indorsement from the defendant to the plaintiff; that title you answer by the plea; and if the plaintiff sues by a new title, subsequent to the indorsement, must he not shew it? Your argument is, that a new title is not to be presumed, unless it be averred.] Yes. In the case of a plea of infancy, it does not negative the ratification after full age, or the fact that the goods were necessities; those matters come by way of answer from the plaintiff. So, a plea of the Statute of Limitations does not negative the fact that the plaintiff was an infant or beyond sea, but leaves it to the other side to aver it. All that the defendant has to do is to answer the plaintiff's case as laid in the declaration; and if the plaintiff has anything beyond to shew that the plea is not a good defence, he must reply it. It may be said, that here the defendant sets up in the plea a different title from that stated in the declaration; but that is not so, for it must be assumed that the bill was returned to the plaintiff by the party to whom he had indorsed it, either before or after the dishonour, and so that he still founds his claim upon his original title. Again, it will be argued, that notice to the plaintiff of the non-acceptance

1845.
BARTLETT
v.
BENSON.

How is the defendant to know which was the fact?] A defendant is always under that difficulty, and therefore it is that several pleas are allowed under such circumstances. The same observation might have been applied in the case of *O'Keefe v. Dunn*. In *Parkin v. Moon* (a), in an action by indorsee against drawer, the defendant pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due. Replication, that it was not indorsed after it became due, but was indorsed to and taken by the plaintiff before it became due. It was held that, on this issue, it was sufficient for the plaintiff to put in the bill, and not necessary for him to give any evidence that the bill was indorsed to him before it became due. [*Pollock*, C. B.—Where the defendant seeks to cut down the effect of the law merchant, he must aver everything necessary for that purpose; not so where he relies upon a broad defence under the law merchant. *Alderson*, B.—In the case of an accommodation defence, the plea must shew that the bill was made for the accommodation of the party, and also that it passed to the plaintiff without value, or after it was due, &c. That is in order to answer the *prima facie* averment of indorsement in the declaration, which means an indorsement *bonâ fide* and for value. But here the plea admits that whole *prima facie* case, and answers it.] All the authorities shew, that as soon as a person is admitted to be the holder of a bill, the party who seeks to cut down his title must shew that he took it after it was due, or with notice of some fraud or laches, and that whether his name is a second time on the bill or not. It is clear that the holder does not acquire a fresh right of action on the *non-payment* of the bill, after *non-acceptance* and notice thereof: *Whitehead v. Walker* (b). There the plea contained the averment which the plaintiff contends it ought to have had here; viz. that the plaintiff

1845.
BARTLETT
v.
BENSON.

(a) 7 C. & P. 408.

(b) 9 M. & W. 506.

1845.
 BARTLETT
 v.
 BENSON.

took the bill with notice of the presentment for acceptance and dishonour. The ground of this defence is personal laches in a third person; and the defendant ought, therefore, either to aver knowledge in the plaintiff of that laches, or circumstances which shew that he ought to have made inquiry, or that he is bound by the equities of the prior holder: *Blesard v. Hirst* (a), *Cripps v. Davis* (b).

POLLOCK, C. B.—I think this rule ought to be discharged. The only difference between the second and third pleas is, that the third makes mention of an indorsement of the bill by the unknown person to whom it had been indorsed by the plaintiff. The second plea alleges, that, after the indorsement of the bill by the defendant to the plaintiff in the declaration mentioned, and before it became due, the plaintiff, being then the holder of the bill, indorsed it to a person unknown, who presented it to the drawees for acceptance, and that acceptance was refused; of which presentment and dishonour the defendant had not due notice. According to all the cases, that is *prima facie* an answer to the declaration. It may or may not be that the plaintiff might have replied something which would have answered this plea, although I doubt whether a replication of that which has been called his second title would not be a departure from the declaration; but it is enough at present to say, that the plea is sufficient, as an entire answer to the title alleged in the declaration. It is said it must be an answer in omnibus. That is so in the case of accommodation bills, for the reason mentioned by my Brother *Alderson*, because the law presumes, till the contrary is shewn, that a bill is negotiated *bonâ fide* and for value. But here the same consideration does not apply, and the defendant is not bound to exclude every possible state of circumstances which might perhaps entitle the plaintiff to

(a) 5 Burr. 2670.

(b) 12 M. & W. 159.

recover. It is enough if he gives a sufficient answer, founded on the law merchant, to the title as stated in the declaration; and it is not necessary for him to set forth what he has no means of knowing, but what the plaintiff does know. The plaintiff knows his own title, and knows by what means he proposes to get rid of the objection. The defendant by his pleas gives a *prima facie* answer; and if there exist circumstances enabling the plaintiff to recover notwithstanding, it is incumbent upon him to aver them.

1845.

BARTLETT
v.
BENSON.

PARKE, B.—I am of the same opinion. Each of these pleas affords a good defence to the declaration; and if the plaintiff had a good answer to that defence, he ought to have replied it. The plaintiff, in his declaration, insists on one title only,—by indorsement from the defendant. That title the defendant has displaced by his pleas: and if the plaintiff stands only upon that original title, my Brother *Byles* admits that he had no right under the circumstances to take the bill up, and that he cannot recover against the defendant, who has had no notice of the dishonour, for non-acceptance. It seems to me that the declaration shews one title only, and that the pleas afford a *prima facie* answer to the declaration, by putting an end to the plaintiff's title by that one indorsement, by which alone he claims in the declaration. The inference is, that he took up the bill after it became due, and so was remitted to that original title which alone he has stated in his declaration. Whether he could reply a new title by a subsequent indorsement, striking out all the intermediate indorsements, without being guilty of a departure from the declaration, I am not prepared to say, but I doubt whether he could have done so: it is not, however, necessary to decide that point.

ALDERSON, B.—I am of the same opinion. What the

1845.
 BARTLETT
 v.
 BENSON.

plaintiff states in his declaration is this: "I am the holder of this bill, and my title consists in the indorsement of it by the defendant to me." The defendant *is* bound to answer *that* title in omnibus. Where the defendant sets up as a defence that it is a bill which could not be sued upon as between the original parties, as in the case of an accommodation bill, inasmuch as the plaintiff has a right to say that the indorsement to him, stated in the declaration, is to be taken to be an indorsement bonâ fide and for value, not merely the writing of the indorsee's name upon the bill, the defendant must in that case go on and shew all the circumstances which establish that the indorsement was not bonâ fide and for value. But here the defendant admits the averment of indorsement to the plaintiff in its fullest sense; namely, that the bill was indorsed by him to the plaintiff bonâ fide and for value, but says there are subsequent circumstances which disable the plaintiff from suing him upon it; namely, that the plaintiff afterwards indorsed it to an unknown person, by whom it was presented for acceptance and dishonoured, of which no notice was given to the defendant. That is a good answer to the declaration; and if there be any new facts sufficient to displace that answer, they must come by way of reply, subject to the doubt whether such a replication would not be bad for departure from the declaration, and whether the plaintiff is not bound, if he have such new title, to state it in his declaration. It is not necessary to determine that point, but I have a strong opinion that he is.

ROLFE, B.—I am of the same opinion, that the pleas afford a good answer to the declaration. And I very much doubt whether there could be any answer at all to the pleas by way of replication; that is, whether the plaintiff can afterwards set up another title, derived from a subse-

quent indorsement to him. At all events, we cannot imagine such a title for him. I think the pleas, however, are perfectly good, and that this rule must be discharged.

1845.
BARTLETT
v.
BENSON.

Rule discharged.

HART v. PRENDERGAST.

Nov. 20.

DEBT for goods sold and delivered.—Pleas, nunquam indebitatus, and the Statute of Limitations. At the trial, before *Pollock*, C. B., at the Middlesex sittings after Trinity Term, it appeared that the debt was contracted above six years before action brought, while the defendant was a clerk in the Excise Office. In order to take the case out of the Statute of Limitations, the plaintiff gave in evidence the following letter, written by the defendant in answer to an application by a clerk of the plaintiff for payment of the debt:—

“ Jan. 8, 1841.

“ Sir,—Having no longer any connexion with the Excise, I only this day received your obliging note of the 6th instant, which will account for any apparent remissness on my part, in not either calling on you or earlier replying. I assure you I will not fail to meet Mr. Hart on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance.”

The following letter, written by the defendant to a clerk of the plaintiff, in answer to an application for payment of the debt—*Held* not sufficient to defeat a plea of the Statute of Limitations:—
“ I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance.”

It was contended for the defendant, that this was not a sufficient acknowledgment to satisfy Lord *Tenterden's* Act, 9 Geo. 4, c. 14. The Lord Chief Baron reserved the point for the opinion of the Court, and a verdict was found for the plaintiff for the amount claimed, the defendant having

1845.
 HART
 v.
 PRESIDENT.

leave to move to enter a verdict for him on the second issue.

On a former day in this Term, *Lusk* obtained a rule nisi accordingly; against which

Hugh Hill now shewed cause.—It is now fully established that the construction of documents of this kind is for the Court, and not for the jury: and, upon an examination of the cases, the Court will find that acknowledgments much less unequivocal than is contained in this letter have been held sufficient to satisfy the statute. The defendant fully admits the subsistence of the debt, and no condition is annexed to that admission. In *Dabbs v. Humphries*(a), the defendant wrote to the plaintiff thus:—"I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money, 30*l.* 9*s.* 9*d.*:" and this was held a sufficient acknowledgment that that sum was due to take the case out of the statute, although certainly no *promise to pay* was contained in it. In *Bird v. Gammon*(b), the acknowledgment was in these terms:—"I wish I could comply with your request, for I am very wretched on account of your account not being paid: there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it: my hope is, that out of the present harvest you will be paid." That certainly was a less strong case than the present, yet there the document was held sufficient to satisfy the statute. [*Parke, B.*—There must be an acknowledgment of the debt, from which we may infer a promise to pay. If the defendant says in writing, "I admit the debt," that is enough; but if he says, "I admit the debt, *but* I have not

(a) 10 Bing. 446; 4 M. & Scott, 285.

(b) 3 Bing. N. C. 883; 5 Scott, 213.

made up my mind how or by what means to pay," how can you from that infer a promise to pay?] The same observation might have been made, and was more strongly applicable, in *Bird v. Gammon*. In *Dobson v. Mackey* (a), the letter relied on was as follows, and was held sufficient:—"I can never be happy until I have not only paid you everything, but all to whom I owe money. . . . Your account is quite correct, and oh! that I were now going to enclose you the amount of it!" There can be no doubt that this document contains a distinct admission of the debt, and the only question is whether the other words of it negative the inference of a promise to pay the debt. [Parke, B.—No; whether it implies a promise to pay *taken altogether*. The substance of it is, "I owe you the debt, but I really cannot tell when or how I am to pay you, and I refrain from making any promise."] Rather that he admits the debt, adding that he thinks he shall pay part of it in a week.

1845.
HART
v.
PRENDERGAST.

Lush, contra.—The present case differs from some of those which have been cited. [Parke, B.—This evidence is to prove a *promise to pay on request*. An *unconditional* acknowledgment is good evidence for that purpose, because you would infer from it that the party meant to pay on request. But if he annexes any qualification or condition, that is not a sufficient acknowledgment, without proof of the performance of it. The principle is correctly laid down in *Tanner v. Smart* (b).] And also in *Cripps v. Davis* (c). The questions therefore are, first, does this letter taken altogether, amount to a promise to pay? secondly, does it support the promise laid in the declaration, to pay on request? It is, at most, only the expression of a *hope* that in a week he shall be able to pay; and that applies

(a) 8 Ad. & E. 225, n.; 4 Nev. & M. 327.

(b) 6 B. & C. 603; 9 D. & R. 549.

(c) 12 M. & W. 159.

1845.
HART
v.
PRENDERGAST.

only to an *undefined part* of the debt, and at all events would not support the declaration for the whole. As to the residue, he says merely that he will then *settle about* the liquidation of the balance. No evidence was given of the defendant's ability to pay. How, then, can this prove a promise to pay on request? *Morrell v. Frith* (a) is an express authority for the defendant. There the letter was as follows:—"Since the receipt of your letter, and indeed for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." This was held not to be sufficient to defeat a plea of the Statute of Limitations. *Parke, B.*, says upon it: "The utmost that can be made of this letter is, that it acknowledges the existence of the debt mentioned in the previous letters, but that the defendant does not mean to express any promise to pay, but reserves it for future consideration." The same observation is applicable here.

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute. I gave no opinion upon the point at the trial; but when the cases are looked at, there are some which furnish very strong ground for this application; and it is better to adhere to the principle of some decision, instead of reasoning on the terms of the particular document in each case. Now the case of *Tanner v. Smart* lays down the principle very clearly, on a review of all the authorities; namely, that, "under the ordinary issue on the Statute of Limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to and maintains the promises in the declaration, although it may shew to demonstration that the debt has never been paid, and

(a) 3 M. & W. 402.

is still subsisting, it has no effect." It is not sufficient that the document contains a promise by the defendant to pay *when he is able*, or *by bill*, or a mere *expectation* that he shall pay at some future time: it should contain either an unqualified promise to pay,—that is, a promise to pay *on request*,—or, if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition, or the arrival of that period, should be proved by the plaintiff. The only question in the present case is, whether this letter contains a promise to pay the debt on request. Now certainly it does not in terms contain such a promise; all that the writer says is, that "he will not fail to meet the plaintiff on fair terms"—what those "terms" may be I cannot say;—and that "he has now a hope that before perhaps a week he shall have it in his power to pay him, at all events, a portion of the debt, when they shall settle about the liquidation of the balance." That liquidation might be by his then asking for further time, with or without security. What are the terms to which the defendant alludes it is impossible to speculate; but there is no promise to pay the whole debt at all, nor to pay a single shilling of it on request, but a mere expression of a hope that he may be able to pay part, and then that they may settle—in what manner does not appear—as to the liquidation of the balance. I am of opinion, therefore, that this letter does not contain a sufficient acknowledgment or promise to satisfy the act of Parliament, and therefore that this rule must be made absolute.

1845.
HART
v.
PRENDERGAST.

PARKE, B.—I am of the same opinion. There is no doubt of the principle of law applicable to these cases, since the decision in *Tanner v. Smart*; namely, that the plaintiff must either shew an unqualified acknowledgment of the debt, or, if he shew a promise to pay coupled with a condition, he must shew performance of the condition; so as

1845.
 HART
 v.
 PRENDERGAST.

in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of *Tanner v. Smart* put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again. In the present case I agree with the Lord Chief Baron, that, taking the whole document together, it contains no promise to pay any part of the debt on request, but a mere expression of the defendant's hope that in a week he may be able to pay a part of it, and that then the parties may be able to make some settlement for the liquidation of the balance.

ALDERSON, B.—I am of the same opinion. We must look to the principle of the cases, although there are some with which it may be difficult to agree upon the particular facts; as in *Gardner v. M' Mahon (a)*. Different minds came to different conclusions of fact upon such documents. But the principle is clear, that the plaintiff must prove an acknowledgment conformable to the promise laid in the declaration, viz., either an unconditional acknowledgment, from which a promise to pay on request is inferred, or an acknowledgment subject to a condition which has been performed, and which then becomes absolute, and so equally maintains the promise laid in the declaration. This document contains neither the one nor the other.

ROLFE, B.—I am of the same opinion. The principle is said to be, that the document must contain either a promise to pay the debt, or an acknowledgment from which such a promise is to be inferred. Perhaps it would be more correct to say, that it must in all cases contain a promise to pay, but that from a simple acknowledgment the law implies a promise; but there must, in all cases, be a promise, in order to support the declaration.

Rule absolute.

(a) 3 Q. B. 561; 2 G. & D. 593.

1845.

WILLIAMS v. NEWTON.

Nov. 20.

DEBT by the plaintiff, as secretary of the Society of Licensed Trinity-House Pilots, for penalties under the Pilot Act, 6 Geo. 4, c. 125, s. 58 (a).—The declaration stated, that whereas heretofore, and after the passing the said act, to wit, on &c., a certain vessel called “The Dart,” of divers, to wit, 242 tons burthen, and drawing divers, to wit, ten feet water, and of which said vessel the defendant was then master, was navigating and passing in and upon a certain navigable river called the Thames, within the limits of the jurisdiction of the said corporation, that is to say, between London Bridge and the Downs, to wit, at the Lower

The 2nd section of the Pilot Act, 6 Geo. 4, c. 125, enacts, that all vessels sailing as well up and down, or upon the river Thames or Medway, &c., between Orfordness and London Bridge, to the Downs, &c., (except as thereafter provided), shall be piloted by pilots licensed

by the Trinity House. The 58th section imposes penalties on masters acting as pilots, after a licensed pilot has offered to take charge of the vessel. Section 62 provides, “that nothing in that act contained shall extend, or be construed to extend, to subject to any penalty the master or mate of any ship or vessel, being the owner or part owner of such ship or vessel, and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports:”—*Held*, that the “places aforesaid,” in this section, mean Dover, Deal, and the Isle of Thanet; that, therefore, the clause exempts from penalties such masters only as navigate their vessels from Dover, Deal, or the Isle of Thanet; and, consequently, that the penalties imposed by section 58 were recoverable from a master piloting his own vessel on a foreign voyage commencing in the port of London, although he was a part owner, and resident in the Isle of Thanet.

(a) Which enacts, “That every master of any vessel who shall act himself as a pilot, or shall employ or continue employed as a pilot any unlicensed person, acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot, licensed and qualified to act within the limits in which such vessel shall then actually be, shall have offered to take charge of such vessel, or have made a signal for that purpose, shall forfeit for every such offence double the sum which would have been legally demandable for

the pilotage of such vessel, and shall likewise forfeit for every such offence an additional penalty of £5 for every fifty tons burden of such vessel, if the corporation of the Trinity House, as to cases in which pilots licensed by or under the said corporation shall be concerned, or the said lord warden, or his lieutenant, as to the cases in which the Cinque Port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for such additional penalty, and certify the same in writing.”

1845.
WILLIAMS
v.
NEWTON.

Pool in the said river, the said vessel being then navigating and passing in and upon the said river on a certain voyage, to wit, from the port of London to a certain other place beyond the Downs, to wit, to the island of Madeira, in the Atlantic sea. And the plaintiff further says, that whilst the said vessel was so navigating and passing as aforesaid, within the limits aforesaid, between London Bridge and the Downs, in and upon the said river, to wit, on the day aforesaid, one Henry Beer Mumford, at the time of the offer hereinafter mentioned to have been made by the said Henry Beer Mumford to take charge of the said vessel, being a pilot under the jurisdiction of the said corporation, was duly licensed by the said corporation, and qualified to act as such pilot, and to have taken charge of such vessel as such pilot, within the limits aforesaid, in which the said vessel then was; and the plaintiff avers, that, at the time of the offer and refusal hereinafter mentioned, the said vessel was not in charge of any pilot licensed to act within the said limits; of which said several premises the defendant, at the time of the making of the offer hereinafter mentioned, to wit, on the day aforesaid, had notice. And the plaintiff avers, that afterwards, and within twelve calendar months next before the commencement of this suit, to wit, on the day aforesaid, the said Henry Beer Mumford then and there duly tendered himself to the defendant (he the defendant being and acting as master of the said vessel, then on her voyage aforesaid) to take charge of the said vessel as pilot, for the purpose of conducting the said ship within the said limits of her said voyage; and the plaintiff avers, that, at the time of the said offer, the license of the said Henry Beer Mumford as such pilot as aforesaid had been duly registered, according to the statute in such case made and provided, by the principal officers of the Custom-house of the place at which the said Henry Beer Mumford did reside, to wit, at the Custom-house in the city of London; and that he the said Henry Beer Mumford,

at the time of such offer, had his license in his personal custody, and then produced the same to the defendant; but the plaintiff says, that the defendant then altogether refused to allow the said Henry Beer Mumford to take charge of the said vessel as such pilot as aforesaid, and then and there, after the said offer and tender as aforesaid, and within the limits aforesaid, he the defendant, not being a licensed pilot in that behalf, acted and continued to act as a pilot on board the said ship, within the limits aforesaid, against the form of the statute, &c. And the plaintiff avers, that the sum that would have been legally demandable for the pilotage of the said vessel was the sum, to wit, of 7*l.* 17*s.* 8*d.*, whereby and by virtue of the statute the defendant hath forfeited for his said offence a large sum of money, to wit, the sum of 15*l.* 14*s.* 6*d.*, being double the amount of the sum which would have been legally demandable by the said Henry Beer Mumford for the pilotage of the said vessel. And the plaintiff further avers, that afterwards, to wit, on the day aforesaid, the case hereinbefore mentioned was a case in which pilots licensed by the corporation were concerned, and that thereupon, to wit, on the day aforesaid, the said corporation did think it proper that the person proceeding, to wit, the plaintiff, should be at liberty to proceed for the recovery of the additional penalty incurred by the defendant for such offence, to wit, the sum of £5 for every fifty tons burthen of the said vessel; and the said corporation did then, to wit, on the day aforesaid, certify the same in writing, whereby and by virtue of the said statute the defendant hath forfeited a further large sum of money, to wit, £20, the same being the amount of the four several sums of £5 for every fifty tons burthen of the said vessel; and thereby and by virtue of the said statute, and of the said certificate of the said corporation, an action hath accrued to the plaintiff to demand and have of and from the defendant the said several sums of 15*l.* 14*s.* 6*d.* and £20, respectively, &c.

1845.
 WILLIAMS
 v.
 NEWTON.

1845.
WILLIAMS
v.
NEWTON.

Plea, not guilty, by statute.

The cause was tried, before *Pollock*, C. B., at the London sittings after last Trinity Term, upon the following admissions, signed by the attornies in the cause; and a verdict was taken for the defendant, subject to a motion to enter a verdict for the plaintiff, damages 35*l.* 14*s.* 6*d.*, if the Court should be of opinion that the defendant was not, under the circumstances stated in the admissions, exempt from taking a pilot at the time when he offered himself.

“ The defendant was the master and part owner of the brig ‘*Dart*,’ of and belonging to the port of London, in the pleadings mentioned, on the occasion of the voyage herein-after mentioned. At the time and on the occasion herein-after mentioned, the defendant was residing at and in the Isle of Thanet. The *Dart*, on the 2nd of January, 1844, sailed from the London Dock down the river Thames, from London, under the defendant’s command, bound for the island of Madeira. Her burthen was 242 tons, and she drew ten feet water. She had not, at any time during the voyage, a licensed pilot on board, or any pilot but the defendant; and she was conducted and piloted by him without the aid or assistance of any licensed pilot, or other person or persons than the ordinary crew of the said ship or vessel. On the said 2nd of January, 1844, upon her leaving the London dock to proceed on her voyage out, and whilst she was in the river Thames, and before she reached Greenwich, Henry Beer Mumford, a licensed pilot, as in the declaration mentioned, offered to the defendant, who was then acting as master, to take charge of her as in the declaration mentioned. His license had been registered as in the declaration mentioned, and he then had it in his custody, and produced it to the defendant. The defendant refused to allow him to take charge of the vessel. The vessel proceeded on her voyage to Madeira, but she stopped at Gravesend, where she brought up for the night, and pursued her said voyage in the morning; and the de-

fendant acted and continued to act as pilot for the purpose of the voyage. The pilotage, if Mumford had acted as pilot, would have amounted to 7*l.* 17*s.* 3*d.*

The pilot has leave to sue under the authority of the Trinity House, as in the declaration mentioned.

That the port of London extends as far as Gravesend; that the geographical positions of the several places, &c. above named, and referred to in the statute 6 Geo. 4, c. 125, may be taken and noticed at the trial, and afterwards on the motion, from any maps or charts in ordinary use."

On a former day in this Term, *Jervis* moved pursuant to the leave reserved at the trial, and obtained a rule nisi to enter the verdict for the plaintiff.

Shee, Serjt., and *Bovill* now shewed cause.—The plaintiff is not entitled to recover these penalties under the 58th section of the act, for the defendant is exempt under ss. 59 and 62. The 59th section provides, "that the master of any collier, or of any vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards from the ports between Boulogne inclusive and the Baltic, &c. &c., or of any other vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any act or acts, charter or charters, for appointment of pilots, may, without being subject to any of the penalties by this act imposed, conduct or pilot his own vessel, where and so long as he shall pilot the same without the assistance of any unlicensed pilot, or other person or persons than the ordinary crew." And sect. 62 enacts, "that nothing in this act contained shall subject to any penalty the master or mate of any vessel, being the owner or a part owner of such vessel, and resid-

1845.
WILLIAMS
v.
NEWTON.

1845.
 WILKINS
 v.
 NEWTON.

ing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own vessel *from any of the places aforesaid* up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports." The only question, therefore, is, whether the words "from any of the places aforesaid" refer to "Dover, Deal, or the Isle of Thanet." The plaintiff will say that the defendant was not conducting his vessel *from* the Isle of Thanet, inasmuch as he was conducting her down the Thames from London Bridge to the island of Madeira. Now, if these words be held to apply only to Dover, Deal, and the Isle of Thanet, the clause must be read as exempting a vessel going "from Dover &c. *down* the river Thames," which cannot be. [*Parke, B.*—Why not? He may go up the river first and down it afterwards. If he goes up the river from the Isle of Thanet, he is not liable, nor if afterwards he goes down to Dover.] It would rather seem that the word "or" should be interposed, thus—"from any of the places aforesaid, *or up or down* the rivers Thames or Medway," &c.; otherwise the words "from any of the places aforesaid" are mere surplusage, because the words at the end of the clause, "or into or out of any port or place within the jurisdiction of the Cinque Ports," are more extensive, for the jurisdiction of the Cinque Ports extends beyond the Isle of Thanet. Besides, the Isle of Thanet is rather a *district* than a *place*. The "places aforesaid" should therefore be referred to the places previously mentioned in the 2nd and 14th sections of the act. The 2nd section provides for the conduct of vessels by licensed pilots "between Orfordness and London Bridge, as also from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel, from the Isle of Wight to London Bridge," . . . "except as hereinafter provided;" which latter words are also in the 14th section; and they seem clearly to point to the subsequent exemptions in favour of owners

of vessels residing at Dover, Deal, or the Isle of Thanet. The object of the legislature was to prevent *ignorant persons* (which these can hardly be) from navigating their vessels up or down the river without a licensed pilot. This statute is essentially a re-enactment of the 52 Geo. 3, c. 39, which was a consolidated act, relating both to the Trinity House and the Cinque Port pilots, as to which there were previously two sets of statutes. The 8 Geo. 1, c. 13, relating to the Cinque Port pilots, contains, in sect. 2, an exception in favour of owners of vessels residing at Dover, Deal, or the Isle of Thanet, conducting their own vessels "from any of the places aforesaid *up* the said rivers." There these words clearly apply to Dover, Deal, or the Isle of Thanet, no other places having been previously mentioned in that act. Accordingly, Lord Tenterden so states the exemption in the first three editions of his work on Shipping, which were published before the passing of the 52 Geo. 3, c. 39. Then the 33rd section of that act, which corresponds with the 62nd of the present act, contains a similar exemption, but it omits the words "from any of the places aforesaid," because otherwise, other places being now "aforesaid," the privileges of the Cinque Port pilots would have been extended to the places within the jurisdiction of the Trinity House. In the present act, those words are reinserted, in order, as it would seem, to meet the case of coming up to London Bridge; but they are unnecessarily inserted, if the Legislature meant them to apply only to Dover, Deal, and the Isle of Thanet. The Legislature clearly intended to enlarge the privilege, giving at the same time an additional security for the safety of the navigation, by requiring that the party exempted should be owner as well as master of the vessel. But if the construction is to be limited as contended for on the other side, how little is the privilege extended! These words must, therefore, now be taken to refer to both sets of places from which both the Trinity

1845.
 WILLIAMS
 v.
 NEWTON.

1845.
 WILLIAMS
 v.
 NEWTON.

House and the Cinque Ports can license pilots. "Dover, Deal, and the Isle of Thanet," are named as places *the residents in which* are to have the privilege, not as indicating the limits of the privilege. [*Pollock*, C. B., referred to *Hammond v. Tremayne* (a).] But further, the defendant is also exempt under sect. 59, inasmuch as his ship was within the limits of the port to which she belonged. [*Pollock*, C. B.—Is London a place "for which no provision has heretofore been made by any act or charter?"] None was made by any *former* act, but only by this act. [*Pollock*, C. B.—According to that construction, every master of a London vessel may navigate her up and down the Thames without a pilot at all. That is contrary to the express language of the 58th clause, and to all our experience as to the port of London.] The proviso can only apply to pre-existing acts and charters. [*Pollock*, C. B.—Oh yes, to *any* acts; besides, no *charters* are repealed by this act.]

Jervis and Barstow, contra.—This case depends entirely on what is the correct construction of sect. 62, which has been already in effect decided by the authorities. In *Hammond v. Tremayne*, Lord *Tenterden*, a Judge most familiar with

(a) Chitt. Stat. 917, n. The note is as follows:—

"In *Hammond v. Tremayne*, tried at Maidstone, before Lord *Tenterden*, Thursday, 8th of August, 1828, in an action of debt against the defendant, the master of a vessel, for not taking a licensed pilot on board, according to 6 Geo. 4, c. 125, ss. 19 and 58, whereby defendant forfeited 17*l.* 19*s.*, being double the pilotage that would have been payable, and £5 penalty, the vessel being under the burden of fifty tons, it appeared that the vessel was navigated by the defendant from a foreign port up the Thames,

and not from Dover, Deal, or the Isle of Thanet; but defendant offered to prove that he resided at Deal, and claimed the benefit of exemption of the 62nd section, insisting that, if the master of a ship reside at either of those places, he is privileged to navigate a vessel up or down the Thames from any part whatever. But Lord *Tenterden* held, that the words 'from any of the places aforesaid' could, as there were no other antecedents, relate only to Dover, Deal, or the Isle of Thanet, and only exempted vessels navigating from one of those places."

this subject, ruled that these words, "from any of the places aforesaid," had reference to their immediate antecedents in the same section, viz. Dover, Deal, and the Isle of Thanet; and the same interpretation has very recently been put upon them by the Court of Queen's Bench, in the case of *Peake v. Screech* (a), in which the earlier statutes were referred to. The party, to be within the exemption, must come from one of those places up or down the river, or from one of those places into or out of a port or place within the jurisdiction of the Cinque Ports. If he starts from one of those places, and goes up the river, he may go down again without a pilot. The argument on the other side would make the word "places" apply to a great extent of the sea. If the former acts appear to conflict with the plaintiff's construction, that is rather an argument against the defendant, as shewing that the words are here designedly used, in order to restrict the exemption within narrower limits, the attention of the Legislature having been directed to the subject. The case of *Peake v. Screech* was fully argued, and is a direct authority for the plaintiff.

1845.
 WILLIAMS
 v.
 NEWTON.

POLLOCK, C. B.—It appears to me that this rule ought to be made absolute. The question turns mainly on the construction of the 62nd section of this act (6 Geo. 4, c. 125); I think the 59th section has no bearing on the point. The question is, what is the meaning of the expression in the 62nd section, "places aforesaid?" Now Lord *Tenterden*, in the case of *Hammond v. Tremayne*, has already put a construction upon those words; and it appears that, in a recent case, the Court of Queen's Bench, adopting that construction, have held those words to refer to the places mentioned in the same section; so that we have the opinion of an eminent Judge, of itself entitled to great respect, especially on a matter relating to navigation,

(a) 14 Law J., (N. S.), Q. B. 317.

1845.
 WILLIAMS
 v.
 NEWTON.

and also a recent confirmation of that opinion by a decision of the full Court of Queen's Bench. But apart from authority, upon the history of this act, and looking to the words in the recital, "that whereas there hath been time out of mind, and now is, a society of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, who have had the pilotage of all ships *from the said places* up the river Thames," where it is clear that those words refer to Dover, Deal, and the Isle of Thanet, I have no doubt that, by the expression in this section, "places aforesaid," the legislature only meant to include Dover, Deal, and the Isle of Thanet. If so, we must substitute them for the expression we find, "places aforesaid," and read the clause thus:—"That nothing in this act shall extend to subject to any penalty any master of any vessel, being the owner or part owner of such vessel, and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own vessel on any voyage from any of those places up or down the river Thames," &c. It is quite clear, therefore, that the exemption in the 62nd section does not extend to the case of such person piloting his own vessel on a foreign voyage, commencing in the port of London. The verdict for the defendant must therefore be set aside, and a verdict entered for the plaintiff for 35*l.* 11*s.* 6*d.*

PARKE, B.—I agree with my Lord Chief Baron in the construction of this clause of the act of Parliament. In that construction we are supported by the opinion of Lord *Tenterden*, and by the recent decision of the Court of Queen's Bench. But, independently of authority, it seems to me that it is the true construction of this section; and the reason is pretty obvious, on looking to the history of these statutes. The 3 Geo. 1, c. 13, s. 2, exempted the master of any vessel, or part owner, residing at Dover, Deal, or the Isle of Thanet, from penalties for piloting his own vessel from any of the places aforesaid up the said rivers. Then the

52 Geo. 3, c. 39, gave a much more extended privilege, without the same limit that existed under the 3 Geo. 1. But afterwards, the legislature, considering that they had given thereby too extensive a privilege, read the two acts together, and by the present act limited it thus:—viz. “to masters or mates, being also owners, of vessels sailing from the places aforesaid, that is, Dover, Deal, or the Isle of Thanet, up or down the rivers Thames or Medway,” &c. With respect to the meaning of the words “up or down,” the reasonable construction is, that the owner of a vessel having liberty to go up the river from those places, should also be at liberty to go down again when he has so gone up. As to the subsequent words, “or into or out of any port or place within the jurisdiction of the Cinque Ports,” we do not pronounce any opinion whether they are limited to a voyage from Dover, Deal, or the Isle of Thanet, or not; it is unnecessary on the present occasion to do so, although I have a strong opinion on the subject. But, both on authority and on the just construction of the statute, it appears to me that there was no exemption in the present case, and therefore that this rule must be made absolute.

ROLFE, B.—I am of the same opinion. The difficulty arises from the vague manner in which the Legislature has expressed its meaning; and, therefore, when once a construction has been put upon such a clause by a judicial decision, that ought of itself to be a sufficient authority for our adopting the same construction. But if I had now for the first time to put a construction upon this clause, I should say that the meaning of the Legislature is not difficult to discover; viz. that from Dover, Deal, and the Isle of Thanet,—taking those places as being, for this purpose, the extremity of the river Thames,—the masters of vessels residing at those places may lawfully conduct their vessels up and down the river without a pilot.

Rule absolute.

1845.
WILLIAMS
v.
NEWTON.

1845.

Nov. 20.

DIMMOCK and Others v. STURLA.

Assumpsit.

The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would sell and deliver to S., on credit, goods of the price to an extent not exceeding £100, the defendant promised the plaintiffs, that, if S. did not pay for the same, she would do so on receiving three months' notice requiring payment. At the trial, the following guarantee was proved:—"In consideration of your supplying S. with goods to the extent of £100, I undertake to pay you for the same if he does not, on receiving three months' notice."

Semble, that there was no variance between the declaration and the guarantee proved: but, assuming the true construction of the guarantee to be that the defendant was not to be liable until £100 worth of goods had been supplied, the declaration might be amended accordingly.

ASSUMPSIT on a guarantee.—The declaration stated that heretofore, to wit, on &c., in consideration that the plaintiffs, at the request of the defendant, would sell and deliver and supply to one Henry Sturla, on credit, goods of the price to an extent *not exceeding* £100, she the defendant promised the plaintiffs, that, if the said Henry Sturla did not pay the same, she the defendant would do so, upon the defendant's receiving from the plaintiffs three months' notice requiring payment of the same. The declaration then averred, that the plaintiffs, confiding in the said promise of the defendant, afterwards, to wit, on the day and year aforesaid, did sell and deliver to and supply the said Henry Sturla, at his request, with divers goods, to an extent not exceeding £100, to wit, to an extent of 68*l.* 5*s.*, and at and for prices of less amount than £100, to wit, of the price of the said sum of 68*l.* 5*s.*, on certain credit then agreed upon between the plaintiffs and the said Henry Sturla; and although the said credit, and the time of payment of the said price of the said goods by the said Henry Sturla to the plaintiffs had elapsed before the commencement of this suit, and although the said Henry Sturla hath paid and satisfied to the plaintiffs the sum of 26*l.* 10*s.* 10*d.*, parcel of the said price of the said goods, yet he hath not, although he was afterwards, and before the commencement of this suit, to wit, on the 7th day of November, 1844, requested by the plaintiffs so to do, as yet paid to them the residue of the said price, amounting to the sum of 41*l.* 14*s.* 2*d.*, of any part thereof.—Breach, the non-payment by the defendant, after three months' notice requiring payment thereof, of the said sum of 41*l.* 14*s.* 2*d.*, or any part thereof.

The defendant pleaded non assumpsit, and other pleas which it is not necessary to state.

At the trial, before *Pollock*, C. B., the following guarantee, signed by the defendant, was proved on the part of the plaintiffs:—

“London, Dec. 1, 1843.

“Gentlemen,—In consideration of your supplying Mr. Henry Sturla, of Seymour-street, Euston-square, with goods *to the extent of £100*, I undertake to pay you for the same, if he does not, upon receiving from you three months’ notice.

“Yours obediently,

“AMEY STURLA.

“To Messrs. T. Dimmock, jun. & Co.”

Upon this undertaking, the plaintiffs supplied goods, consisting of china, earthenware, &c., from time to time, to the order of Henry Sturla (who was starting in business in that line), to the amount of 68*l.* 5*s.* in the whole. In the beginning of 1844, a balance of 41*l.* 14*s.* 2*d.* was due from him; and a letter from the plaintiffs to him, dated 28th January, 1844, was proved, in which they required payment of this balance before they forwarded any more goods, or proceeded with any orders on hand towards completion. No goods were supplied after that time. In April following, Henry Sturla became bankrupt. It was proved that three months’ notice, requiring payment of the balance, had been given to the defendant.

Several objections were taken on the part of the defendant. First, that there was a variance between the declaration and the proof, inasmuch as the true construction of the guarantee was, that the plaintiffs were to supply goods to the extent of £100 *at the least*, whereas the declaration stated it to be an agreement to supply goods to an extent *not exceeding* £100; secondly, that the three months’ notice to be given by the plaintiffs meant a notice to Henry Sturla, and not to the defendant; and, thirdly, that the

1845.
DIMMOCK
v.
STURLA.

1845.
 DIMMOCK
 v.
 STURLA.

notice given to the defendant did not correctly state the balance then due, the sum mentioned therein being 37*l.* 10*s.* instead of 41*l.* 14*s.* 2*d.* The Lord Chief Baron reserved the points, and the plaintiff had a verdict for 37*l.* 10*s.*, with liberty to the defendant to move to enter a nonsuit; the Court to have power to amend the declaration so as to cure the first objection, if it were amendable in that respect.

On a former day in this Term, *C. Jones*, Serjt., accordingly moved for a nonsuit or new trial, and a rule was granted on the ground of the variance, but refused on the other points.

Knowles now shewed cause.—The true construction of this guarantee is, that the plaintiffs were to supply goods to Henry Sturla to an extent *not exceeding* £100, for which the defendant engaged to be responsible. If so, it is correctly stated in the declaration, and the objection on the ground of variance fails. The circumstances of the case shew that this is the only meaning which the parties could have intended to put upon the contract. The plaintiffs did not refuse to supply the goods, until they had notice from Henry Sturla that he intended to compound with his creditors. Nothing is said in the guarantee as to the delivery of all the goods at once, and that evidently was not intended; but the defendant meant to limit her liability to £100 in respect of the successive deliveries. Suppose the plaintiffs delivered goods to the amount of £50 on the day of date of the guarantee, and Henry Sturla then became bankrupt; were they nevertheless to go on and deliver to the amount of £50 more? [*Parke*, B.—The defendant will say the plaintiffs were to supply goods to the extent of £100, if Henry Sturla required them; that it was important to him to have a considerable stock, and therefore the guarantee would not have been given, unless for a supply to the extent of £100. *Pollock*, C. B.—It must surely be read with this limitation, at all events, that the supply

was to be to the extent of £100 if he should reasonably require them; and that the defendant promises to pay for the goods so supplied, to an extent not exceeding £100. *Parke, B.*—If so, the declaration may be amended to suit the facts.]

1845.
 DIMMOCK
 v.
 STURLA.

Charnock (with whom was *C. Jones, Serjt.*), contra.—The question is, whether the words “to the extent of £100” were intended as a limit of the defendant’s liability, or as fixing £100 as the minimum of the supply of goods. The plaintiffs have shaped the declaration according to their means of proof at the trial, without reference to the terms of the guarantee, or the circumstances under which it was given. If they had framed it according to the other view of the case, they must have averred that they were ready and willing to supply goods to the extent of £100, which averment the defendant might have traversed. It is clear that the object of the guarantee was, that Henry Sturla might have a sufficient stock of goods to trade with. [*Parke, B.*—My doubt is, whether it is not implied that he *requires* a supply to the extent of £100. It surely must have that qualification, where the purchase is to be by a third party. If he had understood the contract to be such as you now contend for, would he not have demanded the remainder?] He never dispensed with the further supply, and it was of no use to demand it, after the plaintiff’s positive refusal to supply any more. [He referred to “Fell on Guaranties,” p. 93.]

POLLOCK, C. B.—There may be some doubt as to the true construction of this guarantee, which was framed by the parties themselves. They have acted upon it, however, as an ordinary guarantee for an amount not exceeding £100. It does not appear that Henry Sturla ordered more than about £70 worth of goods; and neither he nor the defendant ever complained that more were not supplied. But if

1845.
 DIMMOCK
 v.
 STURLA.

that be not the true construction of the instrument, it must at all events be read with the limitation suggested by my Brother *Parke*, and then the declaration would have been amendable accordingly. That amendment I should have made, and then the defendant would have been entirely without defence. But as there was some doubt about the construction, which justified the defendant in coming to the Court, the rule will be discharged without costs.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

Nov. 21.

BRITTAIN v. LLOYD.

An auctioneer, who paid the duties on a sale of lands by auction, (where the lands were bought in at the sale, and the Commissioners of Excise refused to remit the duties), was held entitled to recover back the amount from his employer, in an action for money paid.

That action is maintainable in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it; and it is not necessary that the defendant should have been relieved from a liability by the payment.

THIS was an action of assumpsit for money paid by the plaintiff, an auctioneer, for the use of the defendant, and on an account stated.

The defendant pleaded non assumpsit, on which issue was joined; and the cause was tried, before *Tindal*, C. J., at the Derbyshire Spring Assizes, 1844, when it was agreed that a verdict should be found for the plaintiff for 107*l.* 3*s.* 9*d.* damages, the sum claimed by the plaintiff, and 40*s.* costs, subject to the opinion of this Court on a special case; the Court to have power to draw all inferences from the facts which a jury could or might draw.

The defendant, being the owner of a freehold estate, consisting of a farm-house, out-buildings, and lands, situate at Woolow, near Buxton, in Derbyshire, employed the plaintiff, who long before and at the time of the auction hereinafter mentioned, and ever since, has been an auctioneer duly licensed, to sell the said estate by an

auction, to be holden at the Bull's Head Inn, at Fairfield, near Buxton aforesaid, on the 25th of January, 1843. Previous to the commencement, and on the day of the auction, the defendant delivered to the plaintiff the following authority to bid for her, signed by herself and John Poundall:—"To Mr. John Brittain, auctioneer, Green, Fairfield. Take notice, that Mr. John Poundall is appointed by Mrs. Charlotte Lloyd, the real owner of the estate intended to be by you put up to sale by way of auction, at the Bull's Head Inn, Fairfield, on the 25th day of January instant; the said Mr. Poundall being actually employed by the vendor of such estate to bid at the said sale for the use and behoof of the said Charlotte Lloyd. And take notice, also, that the said Mr. John Poundall hath agreed and doth intend accordingly to bid at the said sale for the use and behoof of the said Charlotte Lloyd. As witness the hands of the said Charlotte Lloyd and John Poundall, the 25th day of January, 1845. Charlotte Lloyd, John Poundall. Witness, Samuel Wood." Which notice, duly signed by the defendant and the said John Poundall, being the person intended to make the bidding, was duly given to the plaintiff before the commencement of the sale, and before the bidding by the said John Poundall hereinafter mentioned.

The estate was put up for sale by auction by the plaintiff on the said 25th of January, 1843, and several persons attended and bid, and Poundall attended in the sale-room during the auction, and bid as hereinafter mentioned. The estate was put up for sale by the plaintiff, subject to the following (amongst other) conditions of sale, which were prepared by the plaintiff in the course of his employment as such auctioneer, and read by the plaintiff at the commencement of the auction, viz.:—"That the highest bidder should be the purchaser. That no bidding should be retracted. That the vendor or her agent should have the right of bidding once for the property. That a de-

1845.
 BRITTAIN
 v.
 LLOYD.

1845.
BRITTAIN
v.
LLOYD.

posit should be paid on the fall of the hammer, as also the whole of the auction-duty, to the auctioneer by the purchaser. That the residue of the purchase-money should be paid at a future day, when the estate should be conveyed. All fixtures, articles, and things, timber and timber-like trees growing on the premises, down to and including those of the value of 1s. each, were not to be included in the purchase-money of the premises, but to be paid for in addition to such purchase-money, at a fair valuation, at the time of completing the purchase."

The biddings then commenced, the defendant being in a room in the inn adjoining to that in which the auction was held, and having a servant in attendance in the room, to give her information respecting the biddings, &c. Among the bidders were the names of two persons of the name of Barker and Shaw, the latter of whom ultimately became the purchaser of the estate, as hereinafter mentioned. After several biddings, including several by Shaw, Barker bid £3150, and Shaw shortly afterwards bid £3300: this was communicated to the defendant by her aforesaid servant, and she immediately sent him to desire Mr. Barker to come to her in the private room, and there was a suspension of the auction for a few minutes; Mr. Barker went to the defendant, who inquired of him whether he was bidding for any one in the room, and offered to let him bid a time or two, if he liked; and stated that he might go up to £3800, and he should not be charged with the auction duty; and that if he bid she would not take any advantage of it. He objected, that it was more than the estate was worth; she then requested him to bid for her, to which he acceded, and returned to the auction-room, and the sale was resumed by Barker bidding 3350*l.* for the defendant. Shaw then bid £3400, which was communicated by her said servant to the defendant, and who was immediately sent to fetch Shaw to the defendant out of the auction-room. Shaw was taken to the room where

defendant was, when she asked him if he would give her the auction duty over his last bidding? Shaw replied, he did not know what the auction duty was, but he would wait upon her the following day. It was agreed upon between them that Shaw would wait on her at her residence, at Woolow, the following day, and the hour of two o'clock in the afternoon was fixed. She then told Poundall, in Shaw's presence, to go and bid the reserved bidding, which he did, and bought in the estate at £3800, and the plaintiff knocked down the estate to Poundall, observing, that all the parties attending the sale were then at liberty, according to the usual practice, to bid by private contract; but Shaw would, according to the usage, have the first option. There had been no bidding after Shaw's, of £3400, before Poundall bid the reserved bidding.

The next morning, Shaw met Poundall (who acted for the defendant) at her residence at Woolow, and there saw the defendant. Poundall and Shaw looked over the estate, and Poundall named £3550 or £3560 for the estate, including timber, fixtures, &c., which were estimated in a lump at the sum of £45: he had not received any previous instructions so to do. Shaw then offered £3500 for the estate, and £40 for the fixtures, &c., and said, if he could not have it at that price, he would not have it at all. Poundall then consulted the defendant, and they agreed to split the difference, and that the purchase-money should be £3545. The bargain was made, according to the testimony of Shaw, without any reference to the sale by auction at all.

The defendant then sent for the plaintiff to come to the defendant's house, on the 27th of January, 1843, being two days after the sale, to prepare the agreement between the defendant and Shaw; and the plaintiff and Shaw, on the 27th of January, 1843, came to the defendant's house, when an agreement, to which the plaintiff was an attest-

1845.
 }
 BRITTAIN
 v.
 LLOYD.

1845.
 BRITTAIN
 v.
 LLOYD.

ing witness, of which the following is a copy, was copied by the defendant's daughter, at the request of plaintiff, from a book of the plaintiff's.

"Memorandum.—That Mr. William Shaw is declared the highest bidder and purchaser of the Woolow estate, situate in the parish of Hope and township of Fairfield, in the county of Derby, at the sum of £3545, including the timber plantations and fixtures on the premises; at which sum the said Mr. William Shaw doth agree to become the purchaser thereof accordingly, and doth also agree, on his part, to perform the before-written conditions of sale; and, in consideration thereof, Charlotte Lloyd, the vendor, doth agree to sell and convey the said estate and premises unto the said Mr. William Shaw, his heirs and assigns, or as he or they shall direct, according to the said before-written conditions of sale. And it is also agreed, that the sum of £350 shall be paid as a deposit, which sum is to be considered as part of the purchase-money. Dated this 27th day of January, 1848.

(Signed)

"CHARLOTTE LLOYD,
 "WILLIAM SHAW.

"JOHN POUNDALL,
 "RICHARD SHAW,
 "JOHN BRITAIN, } Witnesses."

There are no other conditions than those set out in the early part of this case.

In March, 1843, the plaintiff duly made the return of the sale to the proper officers of Excise, and that the estate was bought in by defendant for £3800, and duly verified and produced, and left, as required by the act of Parliament, the notice of the said appointment of Poundall, &c.; and also verified the fairness and reality of the transactions to the best of his knowledge and belief, and did all other acts required by law by him to be done, to get the duty on the said auction and sale allowed and

remitted to the defendant; but the Commissioners of Excise refused to allow or remit the same.

On the 22nd of March, 1843, the plaintiff had an interview with the defendant, in order to settle his account against the defendant for the sale of the estate hereinbefore mentioned, and also for another sale the plaintiff had had for the defendant. Some unpleasantness took place between the plaintiff and defendant, in consequence of the defendant complaining of the exorbitancy of the plaintiff's bill, alleging that the plaintiff had charged her too much. The defendant said to the plaintiff, "You had thought to have thrown the auction duty away; but I would not let you." The plaintiff told the defendant that he had not yet settled the sale account with the Excise, and that when he did settle it, if the auction duty was demanded of him, he should demand it of defendant; to which the defendant replied, "Then you must get it, and take it."

Ultimately, in September, 1844, the Commissioners of Excise, or the persons duly authorised in that behalf, required the plaintiff to pay the said auction duty, amounting to 107*l.* 3*s.* 9*d.*, in respect of the said sale of the said estate above-mentioned, being the amount of duty on £3500, and formally demanded the same of the plaintiff, which requisition and demand was duly communicated to the defendant by the plaintiff, and she was required to pay the amount, or to indemnify the plaintiff against proceedings for the recovery of the duty, which was refused by the defendant. Correspondence then took place between the plaintiff and defendant, and the defendant and the Commissioners of Excise; and ultimately the plaintiff was compelled by the Commissioners of Excise to pay the above duty of 107*l.* 3*s.* 9*d.* to the Commissioners of Excise, of which payment due notice was given to the defendant, and she was required to pay the same to the plaintiff, but which she refused; and this action was brought to recover that amount.

1845.
BRITTAİN
v.
LLOYD.

1845.
 BRITTAIN
 v.
 LLOYD.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the amount of the said auction duty.

The case was argued on the 17th of November, by

Whitehurst, for the plaintiff.—The plaintiff is clearly entitled to recover. The duty imposed on sales by auction by the stat. 19 Geo. 3, c. 56, is, by sect. 6, made payable on the knocking down of the hammer, and is thereby declared to be chargeable on the auctioneer; and the 7th section empowers the auctioneer to recover the same by action of debt or on the case, against his employer or the party on whose account the sale was made. Then comes the 12th section, on which the question in this case mainly depends, which enacts, that, where owners of estates bid for themselves, or employ others to bid for them, an allowance of duties is to be made to them, provided notice be given to the auctioneer thereof; and in case of collusion or unfair practice, the allowance is not to be made. Now, the facts of this case shew clearly that this was not such a transaction as was contemplated by that section, and in which it was intended to give the vendor relief; for this was a mere covert proceeding by the vendor, in order to screen her from the payment of the duty. The plaintiff, therefore, having paid the duties under these circumstances, is entitled to recover back the amount from his employer. Moreover, the defendant has litigated this matter before the Commissioners of Excise, who are the parties to determine whether a fraud was committed or not, and they having decided the matter, it is no longer open to discussion.

Humfrey, contra.—This action for *money paid* is not maintainable (a). The auction duty is nowhere made

(a) This point was not stated for argument, and had not been adverted to by the plaintiff's counsel.

chargeable upon the vendor; but, on the contrary, is expressly charged by the act of Parliament upon the auctioneer. The defendant, therefore, was not liable to the Crown for the auction duty, and therefore the money paid by the plaintiff to discharge it was not money paid to the use of the defendant. The question has always been, in considering whether an action for money paid could be maintained, whether the defendant was liable to the payment, and whether the plaintiff has been compelled to pay on his behalf. *Spencer v. Parry* (a) is in point. There, by the stipulations of a lease, the tenant was to pay the land-tax, which he left unpaid during the term; it was paid by the succeeding tenant, to whom the landlord repaid it: and it was held, that, inasmuch as the tenant's liability arose only from the special agreement between him and the landlord, the latter could not recover back from him the amount so repaid, in an action for money paid, but must declare on the special agreement. The plaintiff's counsel there relied on the cases of *Brown v. Hodgson* (b) and *Dawson v. Linton* (c); but Lord Denman, C. J., in delivering the judgment, states and distinguishes those cases, and lays down the rule, that the payment, to sustain the action, must be a payment which relieves the defendant from some liability. His Lordship says, "The only doubt we felt in the course of the argument arose from the cases of *Brown v. Hodgson* and *Dawson v. Linton*, which seemed nearly to resemble the present. In the former case, the plaintiff, a carrier, having by mistake delivered A.'s goods to B., who made them his own, paid A. the price, and was afterwards allowed to recover it from B. as money paid to his use. But this was in fact money paid to his use, for it was in discharge of his debt to A.; and it may be fairly said to have been paid at his

1845.
BRITTAIN
v.
LLOYD.

(a) 3 Ad. & E. 331; 4 Nev. & M. 770.

(b) 4 Taunt. 189.

(c) 5 B. & Ald. 521.

1845.
 BRITTAIN
 v.
 LLOYD.

instance, because he knew that the plaintiff's mistake, in delivering the goods to him, made the plaintiff liable to pay the price to the true owner. His so receiving the goods may be considered as equivalent to saying, 'If you pay him, as you may be compelled to do, for the goods, I will reimburse you.' In the case before us, the defendant is not liable to pay the money to any one but the plaintiff, and that was by virtue of the agreement. In *Dawson v. Linton*, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax made payable by the tenant, but which the local act gave him power to deduct from his rent. The plaintiff paid the tax to redeem his goods, and the Court thought that money paid to the landlord's use, because the landlord was ultimately liable. The defence was, that the money was paid to the use of the tenant for the time being, who was primarily liable. But here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them. The tax remained due by his default, which would give a remedy on the agreement; but it was paid to one who had no claim upon him, and therefore not to his use." *Dawson v. Linton* is the only case which raises any doubt on this point, and that was decided on its special circumstances; and there *Abbott*, C. J., says, "It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it; he has therefore a right to call upon the landlord to repay it for him." In *Grissell v. Robinson* (a), one Peto agreed by parol to grant a lease to the defendant for sixty years; the defendant paid part of the consideration, but Peto died before the contract was completed. The plaintiffs, Peto's executors, then granted the lease, which recited that Peto's agreement had been treated by the Court of Chancery as void, and

(a) 3 Bing. N. C. 10; 3 Scott, 329.

that the lease was granted pursuant to a proposal of the plaintiffs, thereafter mentioned. The plaintiffs having paid their own attorney his charge for drawing this lease, it was held that they were entitled to recover them back from the defendant in an action for money paid. But there *Tindal*, C. J., says, "In order to recover on that count, the plaintiffs must shew an express or implied assent of the defendant to the payment of the money, or that it was paid on compulsion for the use of the defendant. . . . The money was paid by the plaintiffs, who were liable in the first instance, upon an implied engagement in the defendant to repay them, because he was ultimately liable." That case is therefore distinguishable as well from *Spencer v. Parry* as from the present case, for here, as there, the defendant is not in any way liable for the duty, except it be made under special agreement with the plaintiff. In *Lubbock v. Tribe* (a), *Parke*, B., said that the action for money paid could not be sustained in that case, "because the payment of the money did not exonerate the defendant from any liability at all."

But, further, is the defendant liable to the plaintiff at all? The auctioneer must look to the purchaser for the duty, and has no right to charge the vendor with it. [*Pollock*, C. B.—The defendant is clearly liable in some form or other.]

Whitehurst, in reply.—The defendant is liable in this form of action, for she was ultimately liable to pay this money, inasmuch as the auctioneer, by the 7th section of the act of Parliament, is entitled to recover back the amount from her as his employer; and it makes no difference that she was not liable directly to the Crown. In effect and substance, the principal, not the agent, is the party chargeable. [*Parke*, B.—The auctioneer sued the vendor for

1845.
BRITTAIN
v.
LLOYD.

(a) 3 M. & W. 607.

1845.
 BRITTAIN
 v.
 LLOYD.

money paid in *Cruso v. Crisp* (a), and this objection was never taken.] So also in *Capp v. Topham* (b). In *Spencer v. Parry*, the payment was to a person who had no claim whatever on the defendant, and therefore not to his use. But here, the defendant being, by the express terms of the statute, ultimately liable, the law implies a promise on her part to repay the party primarily liable, and therefore gives an action for money paid, according to the doctrine laid down in *Brown v. Hodgson* and *Dawson v. Linton*. It is sufficient that the defendant is bound in law to reimburse the plaintiff; it is not necessary that there should be any direct liability attaching to the defendant. Money paid by A. on the mere request of B., may clearly be recovered back on the count for money paid; and here a request is implied by law. This case, therefore, in no degree conflicts with the decision in *Spencer v. Parry*.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued on Monday last. It was an action by an auctioneer against the defendant, his employer, for the duty which he had been obliged to pay to the Crown on a sale of her estate; and the form of action was for money paid. The Court intimated its opinion, that it was clear that the defendant was liable, but took time to consider whether this was the proper form of action.

It was argued by Mr. *Humfrey*, that this form of action could not be maintained, unless the effect of the payment was to relieve the defendant from some liability for the amount to the party to whom payment was made, and that otherwise it could *not* be paid for the defendant's use; and he relied on the case of *Spencer v. Parry* (a) as an au-

(a) 3 East, 337.

(b) 6 East, 392.

(c) 3 Adol. & Ell. 331.

thority for that proposition; and contended, that, as the defendant in this case was not made liable to the Crown by the act of Parliament, the money was paid to one who had no claim upon her, and therefore not to her use.

This proposition, however, is not warranted by the decision of *Spencer v. Parry*, though some expressions in the report of the judgment give a countenance to the argument of the learned counsel; nor can the proposition be maintained; for it is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay, as he would be on a direct request to pay money for him with a promise to repay it. In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable.

1845.
BRITTAIN
v.
LLOYD.

1845.
 BRITTAIN
 v.
 LLOYD.

In the case of *Spencer v. Parry*, there was no such implied request. In the case of *Grissell v. Robinson*, referred to in the argument, it was considered, and we think rightly, that there was; and the Court of Queen's Bench thought the decision of *Brown v. Hodgson* was to be supported on the same ground. We have now to apply this doctrine to the facts of the present case; and we all think that the plaintiff, having been placed by the defendant in the situation of being obliged to pay the auction duty to the Crown, under circumstances in which the defendant was bound to repay him, may be considered as having paid money to the Crown at her request, and consequently may maintain this action.

Judgment for the plaintiff (a).

(a) His Lordship afterwards added,—“ I will take this opportunity of mentioning the great inconvenience arising from the point not being stated for argument. The learned counsel on one side was called upon to argue, and the Court to attend to the argument of, a point, of the intention to argue which not the slightest intimation had been given; otherwise it could hardly have escaped the research of counsel, or the attention of the Court, that one of the oldest and most common forms of action formerly, when bail was more frequent than now, was an action for money paid, to recover the expenses the bail were put to, although it is clear the principal never was in any degree liable to any part of the expense.”

Nov. 17.

EWART v. JONES.

An action of trespass cannot be maintained against a creditor, who, without malice, sues out a writ of ca.

TRESPASS for assault and false imprisonment.—Plea, justifying under a judgment recovered by the defendant against the plaintiff in the Court of Queen's Bench, upon which a writ of *capias ad satisfaciendum* issued, under which judgment regularly obtained by him against his debtor, after the debtor's discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107. The 81st and 82nd sections of that statute do not render the writ absolutely illegal and void *ab initio*, but only give the debtor a remedy, by application to the Court or a judge for his discharge out of custody.

the plaintiff was taken and imprisoned &c., as in the declaration mentioned, *quæ sunt eadem*, &c.; and verification.

Replication, that, after the recovering by the now defendant against the now plaintiff of the said judgment in the said Court of our lady the Queen, before the Queen herself, in the plea mentioned, and before the said time when &c., in the declaration mentioned, to wit, on &c., she the now plaintiff was a prisoner in actual custody within the walls of a certain prison in that part of the United Kingdom of Great Britain and Ireland called Ireland, to wit, in the public gaol of the county of Antrim there, upon process for and by reason of a certain debt and costs, at the suit of one John Noddin; and, being such prisoner, she the now plaintiff did, within fourteen days next after the commencement of the said actual custody of her the now plaintiff, to wit, on the day and year last aforesaid, duly, and according to the direction and provisions of a certain statute made and passed in the year of our Lord 1840, intituled, "An Act to continue and amend the Laws for the Relief of Insolvent Debtors in Ireland," apply by petition in a summary way to the Court for the Relief of Insolvent Debtors in Ireland for her discharge from such custody, according to the provisions of the said act, which said petition was then duly subscribed by her the now plaintiff, and contained all such matters and things as are required by the said act, and was forthwith, to wit, on the day and year last aforesaid, filed in the said court, pursuant to the directions in the said act contained. And the plaintiff further says, that, upon the filing by her of the said petition, and before the said time when &c., in the declaration mentioned, to wit, on the day and year last aforesaid, the said Court, by a certain order then made by the said Court, in pursuance and according to the provisions of the said act of Parliament, ordered that all the real and personal estate and effects of the now plaintiff, both within this realm and abroad, except the wearing-

1845.

EWART

v.

JONES.

1845.
EWART
v.
JONES.

apparel, bedding, and other necessaries of the now plaintiff, and the working-tools and implements of the now plaintiff, not exceeding in the whole the value of £15, and all the future estate, right, title, interest, and trust of the now plaintiff in or to any real or personal estate and effects, within the realm or abroad, which the now plaintiff might purchase, or which might revert, descend, or be devised or bequeathed or come to her before she should become entitled to her final discharge in pursuance of the said act, and according to the adjudication to be thereafter made in that behalf, or in case the plaintiff should obtain her full discharge from custody without any adjudication being made by the said court, then before the now plaintiff should be fully discharged from custody, and all debts due or growing due to the now plaintiff, or to be due to her before such discharge as aforesaid, should be vested in one James Scott Molloy, who was then the provisional assignee of the said Court; which said order was then, to wit, on the day and year last aforesaid, duly entered of record in the said court, as by the said order, reference being thereunto had, will more fully appear; and notice of the said order was, to wit, on the day and year aforesaid, duly published according to the directions of the said Court. And the plaintiff further says, that, after the making of the said vesting order, and before the said time when &c., to wit, on &c., and within the space of fourteen days next after the said vesting order had been so made as aforesaid, she the now plaintiff did deliver into the said Court for the Relief of Insolvent Debtors in Ireland, a schedule containing a full and fair description of the now plaintiff, as to her name, trade, and profession, together with her last usual place of abode, and the place where she had resided during the time her debts were contracted, and also a full and true description of all debts due or growing due from her at the time of making such order, and of all and every person and persons to whom she then was indebted,

or who, to her knowledge or belief, claimed to be her creditors, together with the nature and amount of such debts respectively, distinguishing such as were admitted from such as were disputed by her the now plaintiff; and also a full, true, and perfect account of all her estate and effects whatsoever, and containing all other matters and things which in and by the said statute were required to be inserted in the said schedule. And the plaintiff further says, that the name of the now defendant was duly inserted in the said schedule as a creditor of her the now plaintiff, together with a full and true description of the said judgment recovered by the said now defendant against her the now plaintiff in the said court of our lady the Queen, before the Queen herself, in the said plea mentioned, and of the debt and sums of money due from the now plaintiff to the now defendant, under or by virtue of the same judgment; and that the said schedule was, to wit, on the day and year last aforesaid, subscribed by the now plaintiff, and forthwith filed in the said court, together with all books, papers, deeds, and writings in any way relating to the estate or effects of the now plaintiff, in her possession or under her custody or control. And the plaintiff further says, that, after the said schedule had been so filed as aforesaid, the said Court for the Relief of Insolvent Debtors in Ireland did forthwith, to wit, on the day and year last aforesaid, appoint a certain time within four calendar months from the date of such appointment, to wit, on &c., and a certain place, to wit, the Court-house at Carrickfergus, being the assize town of the county where the said gaol in which the plaintiff was so confined as aforesaid is situate, to be the time and place for the plaintiff to be brought before William Henry Curran, Esq., being one of the commissioners of the said court, to be dealt with according to the provisions of the said act; and that the said Court for the Relief of Insolvent Debtors in Ireland, to wit, then, caused due

1845.

EWART
v.
JONES.

1845.
EWART
v.
JONES.

notice of the said vesting order having been so made as aforesaid, and of the said schedule having been so filed by the now plaintiff as aforesaid in the said court, and of the said time and place so as aforesaid appointed for the now plaintiff, as such prisoner as aforesaid, to be brought up as hereinbefore mentioned before the said commissioner of the said court, to be given, and the same was then duly given, to the defendant by the means appointed by the said court, to wit, by being sent by post to the now defendant, directed to him the now defendant, at his then residence, and was also duly given to the said detaining creditor, and to the other creditors named in the said schedule of the said now plaintiff, and was also, to wit, then, duly inserted in the Dublin Gazette, and in divers, to wit, two other newspapers, by the order of the said Court for the Relief of Insolvent Debtors in Ireland. And the plaintiff further says, that afterwards, and at a reasonable time in that behalf before the said time so as aforesaid appointed for the now plaintiff to be brought up before the said commissioner, to wit, on &c., the said notice, so sent by post to the now defendant, was duly received by him the now defendant; and that afterwards, to wit, at the time and place so as aforesaid appointed in that behalf, the now plaintiff, as such prisoner as aforesaid, was brought up for her examination before the said commissioner, and was duly examined by the said commissioner, and duly sworn as to the truth of the said schedule; and the now plaintiff then duly executed a warrant of attorney to authorise the entering up of a judgment against her the now plaintiff in one of the superior courts at Dublin, to wit, the Court of Queen's Bench at Dublin, in the name of the said provisional assignee of the said Court for the Relief of Insolvent Debtors in Ireland, for the amount of debts stated in the said schedule of the said now plaintiff to be due, or claimed be due, from the said now plaintiff; and that afterwards, and before the said time when &c., to wit, on &c., by a certain order of adjudication then made by the said Wil-

liam Henry Curran, so being such commissioner as aforesaid under and by virtue of the said act, upon hearing the matters of the schedule of the plaintiff, and upon examination made into the same, and upon the said plaintiff swearing to the truth of the same, and executing a warrant of attorney, in pursuance of the said act, it was adjudged and ordered that the said now plaintiff should be discharged from custody, and entitled to the benefit of the said act forthwith as to the several debts and sums of money due or claimed to be due on the 22nd day of May, 1844, being the time of making the order vesting the estate and effects of the now plaintiff, pursuant to the said statute in that behalf, from the now plaintiff to the several persons named in the schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons gave credit to the said now plaintiff before the said time of making such vesting order, and which were not then payable, and as to the future claims of any surety or bail for the now plaintiff, named in the schedule so made as aforesaid as a contingent creditor of the said now plaintiff, and as to the claims of all other persons not then known to the now plaintiff, who might be indorsees or holders of any negotiable security set forth in the said schedule so sworn to as aforesaid. And the plaintiff further says, that she was, to wit, on the day and year last aforesaid, and before the said time when &c., by virtue of the said order of adjudication of the said court so made as aforesaid, discharged out of the said custody in Ireland aforesaid. And the plaintiff further says, that the said George Harrison, so being such sheriff as in the said plea mentioned, took and arrested the now plaintiff, at the said time when &c., in the said declaration mentioned, as in the said plea mentioned, at the request and by the direction of the now defendant, after she the now plaintiff had so as aforesaid become entitled to the benefit of the said act by the said adjudication with respect to the said debt,

1845.
 EWARD
 v.
 JONES.

1845.

EWART
v.
JONES.

damages, costs, and charges in the said plea mentioned, and with respect to the said judgment for the same debt, damages, costs, and charges, in the said court of our lady the Queen, before the Queen herself, in the said plea mentioned. And the plaintiff further says, that afterwards, and during the time that she the now plaintiff was so as aforesaid a prisoner in the custody of the said George Harrison at the suit of the now defendant, to wit, on the 7th day of August, 1844, by a certain order then made in the said action, at the suit of the now defendant against the now plaintiff, by the Honorable Mr. Justice *Maule*, then being a justice of the court of our lady the Queen at Westminster, and entitled to act as a judge of the said Court of our lady the Queen, before the Queen herself, under and by virtue of the statute in such case made and provided, being the court out of which the said writ of *capias ad satisfaciendum*, in the said second plea mentioned, issued, it was ordered, upon hearing the attornies or agents on the part of the now defendant and the now plaintiff, and upon reading the affidavit of Cornwallis Paley, the affidavit of George Sibson, the affidavit of the now plaintiff, the affidavit of William Robinson, the affidavit of William Irving, the affidavit of Matthew Matthews, and the affidavit of Daniel M'Donnel, that the now plaintiff should be discharged out of the custody of the sheriff of Cumberland as to the said action, she having previously to her arrest been discharged under the provisions of the said first-mentioned act of Parliament, as to the judgment, debt, and costs in the said action. And the plaintiff further says, that afterwards, and before the commencement of this suit, to wit, at the end of the said two months in the said declaration mentioned, she the now plaintiff was duly discharged from the said custody of the said George Harrison, by virtue of the said last-mentioned order.—Verification.

General demurrer, and joinder.

E. V. Williams, in support of the demurrer.—The question intended to be raised upon this demurrer probably was, whether, in trespass for false imprisonment, it is a good replication to a plea of justification under a *ca. sa.* issuing out of one of the courts at Westminster, that the plaintiff had been discharged from her debts by an adjudication of the Court for the Relief of Insolvent Debtors in Ireland. But it appears to be unnecessary to discuss that point, because a writ of *ca. sa.*, if founded upon an existing judgment, is at all events a sufficient protection to those who act under it: and therefore, even if the adjudication had been by the Insolvent Court in England, still this replication would be no answer to the plea; for the defendant was not liable to be sued in *trespass* for the imprisonment under the *ca. sa.*, until it was set aside for irregularity. He might, indeed, have been liable in *case*, if he were shewn to have vexatiously abused the process of the Court. [*Parke, B.*—The Judge's order set forth in the declaration does not say that the writ is irregular; it merely directs that the plaintiff shall be discharged.] It certainly cannot be said that the writ has been set aside, or is not a subsisting defence. *Tarlton v. Fisher (a)* is in point for the defendant.—The Court then called upon

1845.

EWART
v.
JONES.

Martin, *contra*.—The question in this case turns on the construction to be put upon the 81st and 82nd sections of the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107. The 81st section enacts, "That no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall, at any time thereafter, be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, unless by the special order of this court, as hereinbefore mentioned, or for or by reason of any debt or sum of money, or costs,

(a) 2 Dougl. 676.

against such prisoner according to this act, and by special order of the said court obtained for that purpose, as hereinbefore mentioned; and that, if any suit or action shall be brought, or any scire facias be issued against any such person, his heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognisance acknowledged by, such person for the same, except as aforesaid, it shall be lawful for such person, his heirs, executors, or administrators, to plead generally that such person was duly discharged according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any matter specially, whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matter pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially." Now, when the legislature declares, in express words, that "no writ of *capias ad satisfaciendum* shall issue" &c., surely the issuing of such a writ, under the circumstances contemplated by the act, is an illegal act, and the writ so issued altogether void. It is true that a *sheriff* may justify under a writ of *ca. sa.*, although it be irregular and void; but that is because he is the officer of the court, bound to obey its order: *Whitworth v. Clifton* (a), *Barker v. St. Quintin* (b). But the plaintiff in the action is in a totally different position; he sues out the process at his peril, and is liable in trespass if

1845.

EWART
v.
JONES.

(a) 1 M. & Rob. 531.

(b) 12 M. & W. 441.

1845.

EWART
v.
JONES.

the writ turn out to be irregular and void: *Parsons v. Loyd* (a), *Barker v. Braham* (b). A sheriff has even been held liable in trespass for the arrest of a person having privilege from arrest: *Magnay v. Burt* (c). [*Parke, B.*—The question is, how far the arrest is rendered illegal by the statute: is it rendered absolutely illegal and void from the beginning, or is it merely that the party, if arrested under the act, shall have his remedy by application to a judge for his discharge?] Surely the legislature, when they provide the means of relief from the immediate pressure of the imprisonment, are not to be intended thereby to have deprived the party of his legal remedy for the wrong done him by that imprisonment. If so, he must be equally remediless in the case where his *goods* are taken in execution after his discharge under the act; yet in that case no summary relief is given.

E. V. Williams, in reply.—The provision in the commencement of the 82nd section appears to have been intended to meet the case of a judgment recovered in respect of a debt or sum of money mentioned in the schedule, and not that of a *ca. sa.* issued on a judgment entered in the schedule. That provision was introduced into the Insolvent Acts in consequence of the decision of the Court of Common Pleas in *Sweenie v. Sharp* (d).

POLLOCK, C. B.—I am of opinion that our judgment must be for the defendant. The plaintiff sues in an action of trespass for false imprisonment, which the defendant justifies under a *ca. sa.*, issued at his suit against the plaintiff, to which the plaintiff replies her discharge under the Insolvent Debtors Act in Ireland, the 3 & 4 Vict. c. 107, ss. 81, 82: and the question is, whether the language of

(a) 3 Wils. 341.

(b) *Id.* 368.

(c) 5 Q. B. 381; 1 Dav. & Mer. 652.

(d) 4 Bing. 37; 12 Moore, 163.

that act entitles her to maintain this action of trespass. Now, undoubtedly, it has long been established, that exemptions from arrest will not entitle parties to sue in trespass, where those exemptions have been violated. This was clearly settled in the case of *Tarlton v. Fisher* (a). Subsequently to that case, various classes of persons have become entitled to exemptions from arrest under particular statutes, such as the Lords' Act, the Bankrupt Act, &c.; and I think we may take it as established law, that, as far back as the 5 Geo. 2, c. 30, the language of which is not so strong as that of the act now before us, it has always been considered, that a bankrupt or insolvent debtor must take the benefit of his exemption by an appeal to the court or a judge, and that he is not entitled to his action of trespass also. There is also the recent case of *Yearsley v. Heane* (b), which was lately decided in this court, and in which it was distinctly held, that a party who applied to a commissioner of bankrupts, under the 5 & 6 Vict. c. 115, and obtained an interim order, which protected him from arrest, could not maintain trespass for his arrest under a ca. sa. during the time the order was in force, and could only have his remedy by applying to a court of competent jurisdiction for his discharge. In the cases which were cited by Mr. *Martin*, of *Barker v. Braham* and *Parsons v. Loyd*, the writ was absolutely void in consequence of matter apparent on the face of it, and within the knowledge of the party by whom it was sued out. In the present case, it has been pressed on us in argument, that the issuing of a writ of ca. sa., under the present circumstances, is expressly and in terms prohibited by the Irish statute. The question, however, is, not whether the writ is absolutely void, but in what way the party grieved is to take advantage of the irregularity, or, it may be, the illegality of issuing it. It appears to me that the Insolvent Debtors Act does not at all vary the general

1845.

EWART
v.
JONES.

(a) 2 Doug. 676.

(b) *Ante*, 322.

1845.

EWART
v.
JONES.

rule to which I have referred; it would be productive of great inconvenience and great mischief if a party were to be held liable in an action of trespass, for issuing a writ under circumstances where he had no notice whatever that he was not entitled to do so; for Mr. *Martin's* argument is, that a creditor who, with no notice of a discharge obtained behind his back, proceeds to avail himself of a judgment which he has regularly obtained, and issues a writ accordingly, is liable to be sued in trespass. It appears to me that the same doctrine holds in this case as has been always hitherto recognised under the Insolvent and Bankrupt Acts, and consequently that the plaintiff cannot maintain this action. No argument can be founded on the ground of any supposed hardship in the case; for, so far back as *Tarlton v. Fisher*, it was clearly laid down, that a party who, knowing of an exemption from arrest, *maliciously* sues out a writ, is liable in an action on the case. Here, however, the question is whether trespass will lie. I am of opinion that it will not, and our judgment, therefore, must be for the defendant.

PARKE, B.—I am entirely of the same opinion, and think that the defendant is entitled to our judgment. The question resolves itself into this—what is the true construction of the statute which gives this discharge to insolvent debtors in Ireland. And that turns upon what is meant by the provision in the 81st section of that act, which says, that no person who shall have become entitled to the benefit of that act shall be imprisoned &c., unless by the special order of the court, or under certain circumstances, and the expression used in the 82nd section, that “no *capias ad satisfaciendum* shall issue” against him. Does the legislature mean, that a *ca. sa.* issued under such circumstances shall be absolutely void, and so much waste paper, and that the arrest of the person after his discharge under that act shall be utterly illegal, so as to warrant an action of trespass?

It is quite clear to me that the legislature intended no such thing. Look at the words of the 81st section ; all that it enacts is, that, if any person is arrested after he has been declared entitled to the benefit of this act, it shall be lawful for any judge of the court from which the process issues to release him from custody, &c. The language of the 82nd section, which follows, is somewhat different, and the provisions are not, perhaps, very correctly stated, or so fully as they ought to have been. It enacts, that “ no *capias ad satisfaciendum* shall issue” against the party so discharged under the act. Now I take these words to mean, that a plaintiff who has a suit against the insolvent *ought not* to issue a *ca. sa.* ; not that, if issued, it shall be absolutely void. I agree with my Lord Chief Baron, that such a construction would be an extreme hardship, and ought not to be adopted, unless we are constrained to do so by express words ; for a plaintiff would thereby be rendered liable in trespass, although he might never have known of the discharge, and had ever so good a claim against the insolvent. The subsequent part of the 82nd section extends the same provisions to a *ca. sa.* issued in any fresh action commenced against the insolvent ; and to extend the plaintiff’s argument to a *ca. sa.* issued in a fresh action would be so absurd, that it is impossible to adopt it, for it would make a party a trespasser, though the former judgment may have been pleaded, and his right to recover affirmed by the House of Lords. Even if the provisions of the 82nd section stood alone, I am by no means satisfied that its declaration, that no *ca. sa.* shall issue, would render the writ null and void. But, taking the two sections together, the construction which is sought to be put on this statute, that it renders the writ absolutely void, appears to me to be quite unwarranted, and its consequences would be so serious, that we cannot admit it, except upon the plainest words. I think the legislature only meant, that the thing mentioned in the 82nd section was not to be done, and

1845.
 EWART
 v.
 JONES.

1845.

EWART
v.
JONES.

that the party aggrieved should have his remedy by an *audita querelâ*, or an application to the Court, which is a substitute for it.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the defendant.

DOE d. GYDE v. ROE.

Where the declaration in ejectment was intitled of Trinity Term, 9th (instead of 8th) Vict., and the notice had no date, but required the tenant to appear in *next Michaelmas Term* (1845), and a regular service was effected before that Term, the Court granted a rule for judgment.

WOOLRYCH moved for judgment against the casual ejector. The declaration was entitiled of Trinity Term, 9th (instead of 8th) Victoria; the notice had no date, but required the tenant to appear in *next Michaelmas Term*. The service was in all respects regular, and was effected before the commencement of this Term. He contended, that the notice, being without a date, was good from the delivery of it, and so that the proceedings were not vitiated by the mistake in the declaration; and cited for this purpose *Doe d. Woodroffe v. Roe (a)*.

PER CURIAM (b),

Rule granted (c).

(a) 5 Scott, N. R., 800; 4 8 Scott, 385; *Doe d. Crooks v. Mann. & G.* 810. *Roe*, 6 Dowl. P. C. 184: *Doe d.*

(b) *Pollock, C. B., Alderson, Saunders v. Roe*, 12 M. & W. 556: *Doe d. Yeomans v. Roe*, 2 D. &

(c) See *Doe d. Greene v. Roe*, L. 23.

1845.

HALE v. OLDROYD.

Nov. 19.

CASE.—The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, divers, to wit, three closes of land, situate &c., and certain, to wit, three, ponds filled with water, one pond thereof being in and upon each of the said closes respectively, were in the possession of one J. Bromley, as tenant thereof to the plaintiff, the reversion thereof being in the plaintiff; and that a certain other close, adjoining and near to the said three closes of the plaintiff, was in the possession of the defendant. It then stated, that the several tenants of the said three closes were and are entitled, from time whereof the memory of man was not to the contrary to the overflow of a certain stream of water, from the said close of the defendant into the said closes of the plaintiff, for supplying the said ponds in the said closes with water for watering the cattle of the said tenants, &c. The declaration then alleged a diversion of the water of the said stream by the defendant, by means whereof the reversionary estate of the plaintiff was injured, &c.

Pleas, first, not guilty; secondly, a traverse of the right of the tenant to the overflow of the water, modo et formâ. Issues thereon.

At the trial, before *Coltman, J.*, at the last York Assizes, the following facts appeared in evidence:—

The defendant was the owner of a close called the Well Close, on the east side of which was an ancient public well, this close being separated by a hedge and ditch from the three closes of the plaintiff. The water from this well, which occasionally overflowed, had, from time immemorial,

was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under 2 & 3 Will. 4, c. 71, s. 7—*Held*, that he was entitled, under this declaration, to recover in respect of his right to the flow of water to the old pond.

In case for the diversion of water, the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged.

It appeared in evidence at the trial, that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which

1845.
HALE
v.
OLDBROYD.

run down to the ditch and fence, and had then passed through the fence into an ancient pond in one of the plaintiff's closes, where it was used for the watering of cattle. In the year 1811 or 1812, one John Collinson, the then occupier of the Well Close, made a new drain from the well to the ditch, whereby he diverted the stream that had supplied his well, and brought the water from the east to the west end of the Well Close, where it was received in a cistern, and used by the public. Shortly after this, the then occupier of the plaintiff's three closes made a new pond in each of them, and supplied them with water by a cut from the ditch into each of them. The ponds so supplied were used by the successive tenants of the plaintiff's three closes, from that time until the diversion complained of, being more than twenty and less than forty years. After the making of the new ponds, the plaintiff's old pond was disused, and was gradually filled with rubbish and overgrown with grass. In 1843, the defendant, by a new drain, again turned the water in the well away from the ditch and the plaintiff's three ponds, upon which this action was brought. Under these circumstances, it was contended for the plaintiff, that he had acquired a title to the flow of water into his three *new* ponds by twenty years' enjoyment; but that, at all events, he had established a right to a flow of water into his *old* pond by immemorial user. The defendant's counsel contended, that the three *new* ponds were alone claimed in the declarations, and, in answer to the plaintiff's case as to them, gave evidence that John Collinson was devisee for his life of the defendant's close, up to his death in the year 1826, and, therefore, that, under the exception in the 7th section of the Prescription Act, 2 & 3 Will. 4, c. 71, the time of his life estate being excluded from the computation, no right was gained by the plaintiff under that statute. The learned Judge, however, thought that, under the terms of the devise, John Collinson was tenant in tail of the Well Close, and, the jury having found that the plaintiff and his predecessors had used the

water in the *old* pond from time immemorial, he directed the verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him as to the right to the overflow to the three *new* ponds.

On a former day in this Term, *Martin* obtained a rule nisi accordingly; against which

1845.
HALE
v.
OLDROYD.

Baines, *Crompton*, and *Hoggins* now shewed cause, and contended, first, that the plaintiff was entitled, under this declaration, to shew his right, by reason of immemorial user, to have the flow of the water into his *old* pond, and that it was no answer to that claim of right to say that the pond had been filled up and disused. There was no proof of his having released or expressly abandoned his claim; and this declaration did not confine him to proof of his title to the flow of water into the three new ponds. The allegation of title to three ponds was clearly divisible. Secondly, they argued that John Collinson was tenant in tail, and therefore the statute did not prevent a right being acquired to the flow of water into the three new ponds: but the Court intimating a clear opinion, that, under the terms of the devise, John Collinson was tenant for life only, this point was given up.

Martin, *Tomlinson*, and *Hugh Hill*, in support of the rule.—It is obvious that this declaration has been framed with reference to the plaintiff's claim to the three new ponds, and that it is adapted to that claim only. They were filled with water before the commission of the grievances by the defendant; there was one of the new ponds in each close; the stream then supplied those ponds, and those only, with water; and they were the three ponds which became wholly dry by reason of the diversion of the water. In all these particulars the declaration is adapted only to the three new ponds, and in none of them to the old pond, the use of which had been abandoned long before the diversion, and which, indeed, could no longer be

1845.
 {
 HALE
 v.
 OLDBROYD.

termed a pond. If the plaintiff intended to rely upon his immemorial right to the flow of water to the old pond, he ought, before bringing this action, to have done some act to indicate his intention of resuming his right to it, as by preparing it for the reception of water, or at least to have given notice of his desire to have the flow of water to it restored. But it is plain that it was in respect of the three new ponds, which alone were of any value to the plaintiff, that this action was brought, and that the verdict would have been taken, if the statute had not interfered with the establishment of an easement in respect of them. Suppose the plaintiff had declared in trespass for breaking and entering three closes of pasture, and, the title being put in issue, he had given some evidence of title to three closes of ancient unbroken pasture, which the defendant met by stronger evidence of title in himself or another—would the plaintiff then have been allowed to turn round and entitle himself to a verdict, by proof of title to a fourth close, which had formerly been pasture, but for twenty years and more had been in tillage, upon a pretence that hereafter it might be laid down in grass again? The whole of this declaration, and the whole conduct of the cause, shew that the plaintiff ought to be limited to that which alone was his real claim, namely, the right to the water for the use of his three existing ponds. [*Parke*, B., referred to *Bower v. Hill* (a).]

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to retain his verdict in respect of the old pond, and that the verdict should be entered for the defendant as to two ponds. [His Lordship stated the pleadings and facts, and continued:] The plaintiff, in bringing his action and declaring for an infringement of his right to a flow of water to the three ponds, meant, no doubt, to recover in respect of the three *new* ponds. At the trial, however, he was met by an objection of an outstanding tenancy for life in the

(a) 2 Bing. N. C. 339.

party from whom the right to the flow of water to these three ponds was derived. He then fell back upon his claim to recover in respect of the old pond; his argument being, that the three ponds were merely a substitution for the old one, and that, by disusing the latter, he had not lost his legal right to it altogether. And it seems to me that he is right in this argument, and that, having been defeated as to the three ponds, he was entitled to resort to the other; and that it is no objection to his doing so, that that pond was not, at the time of the diversion, in a fit state to be actually used by him. The verdict will therefore stand as to one pond, and the rule will be absolute to enter a verdict for the defendant as to the two others.

1845.
HALE
v.
OLDBROYD.

PARKE, B.—I am of the same opinion. The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot; and a substitution of that nature is not an abandonment. He has a right, therefore, under this declaration, to recover in respect of the old pond. The right alleged is a right to have the uninterrupted flow of certain surplus water into a pond; and that right is equally proved, whether it be by prescription or lost grant, or under Lord *Tenterden's* Act. The declaration means no more than this, that the plaintiff has a right to the overflow of water, either in one pond or in three ponds.

ALDERSON, B., concurred.

ROLFE, B.—I am of the same opinion. The declaration means only that the plaintiff has a right to have certain land covered with water; and no abandonment of that right has been proved. If the plaintiff had even filled up the pond, that would not in itself amount to an abandonment, although, no doubt, it would be evidence of it.

Rule absolute accordingly.

1845.

Nov. 19.

ALSAGER and Others, Assignees of EVANS and Others,
Bankrupts, v. THE ST. KATHERINE'S DOCK COMPANY.

A charter-party stipulated that the ship should proceed from London to Bombay, and, being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo "on being paid freight at and after the rate of £4 per ton," &c. By a subsequent clause it was stipulated, that the freight was to be paid "on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom-house :"—
Held, that, upon the construction of these stipulations taken together, the freight was not payable until two months after the inward report; and the shipowner had not, after the cargo was discharged pursuant to the charter-party, any lien thereon for the freight.

ASSUMPSIT to recover the sum of 1852*l.* 6*s.* 8*d.*, as money had and received by the defendants, to the use of the plaintiffs. An interpleader summons having been taken out by the defendants, the following case was, by consent of the parties, ordered to be stated for the opinion of this Court :—

The plaintiffs are the assignees of Messrs. Evans, Foster, & Langton, bankrupts. On the 23rd of August, 1841, a charter-party, being partly printed and partly written, was entered into between the bankrupts and William Mitcheson, who was the owner of the ship called the "East London." The charter-party was to the following effect :—
"That it was agreed between William Mitcheson, owner of the ship called the 'East London,' then lying in the river Thames, and Messrs. Evans, Foster, & Langton, of London, merchants, that the said ship shall proceed to Bombay, and there load from the factors of the freighters a full and complete cargo of legal merchandize, and, being so loaded, shall therewith proceed to London, and discharge in any dock freighters may appoint, *or so near thereto as she may safely get and deliver the same, on being paid freight* at and after the rate of £4 per ton, such ton to be computed according to the new schedule of tonnage now in use in Bombay, and those goods not in the schedule to be computed by fifty cubic feet measurement; sufficient money to be advanced the master, not exceeding £250, free of interest and commission, for ordinary ship's disbursements, against his draft upon the owners for the same, drawn at usance, (*the act of God, the Queen's enemies, and all and every other dangers and accidents of the seas, rivers, and navigations, of whatever nature and kind soever, during the said voyage, always excepted*), the freight to be paid on un-

loading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom-house, London," &c. (a).

Pursuant to the terms of this charter-party, the vessel sailed upon her intended voyage, and, having arrived in safety in Bombay, was there, during the months of July and August, loaded by the bankrupts with merchandize, belonging in part to themselves and in part to general shippers. After the loading and sailing of the vessel, and previous to the completion of the homeward voyage and the arrival of the ship in the Thames, Messrs. Evans, Foster, & Langton committed acts of bankruptcy; and previous to such completion of the homeward voyage, namely, on the 24th of October, 1842, a fiat in bankruptcy was issued against them, under which the plaintiffs were appointed assignees. On the 25th of January, 1843, the ship arrived, with her cargo on board, in the St. Katherine's Docks, and the cargo was landed in the said docks, and lodged in the custody of the defendants, the proprietors of the docks, under the provisions of the 3 & 4 Will. 4, c. 57, s. 47. The ship was reported at the Custom-house on the 25th of January, 1843, and the cargo was landed and lodged on or about the 26th of January. Notice was given of the claim of the freight, both on the goods of the bankrupt and of the general shippers, by the said William Mitcheson, the owner of the said ship; and the plaintiffs, the assignees of the bankrupts, also claimed, in due form, to have the goods belonging to the bankrupts delivered to them without paying freight to the shipowner, and also claimed the freight due from the general shippers, amounting to 130*l.* 19*s.* 11*d.* The sum of 152*l.* 6*s.* 9*d.* was claimed by the owner of the said ship for the freight of the goods shipped by the bankrupts on their own account; and

1845.
ALSAGER
v.
THE ST.
KATHERINE'S
DOCK CO.

(a) In the original, the words in italics were printed; the rest was written.

1845.
 ALBACER
 v.
 THE ST.
 KATHARINE'S
 DOCK CO.

that sum was deposited with the defendants, under the provisions of the 3 & 4 Will. 4, c. 57, s. 47, by the plaintiffs, under protest, in order that they might obtain possession of the goods belonging to the bankrupt's estate; and that sum remained in the hands of the said company, until it was afterwards brought into court for the use of the parties entitled thereto.

The question for the opinion of the Court is, whether the plaintiffs, as assignees of the said Messrs. Evans, Foster, & Langton, are entitled, or whether the said William Mitcheson is entitled, to the sums of 152*l.* 6*s.* 9*d.* and 130*l.* 19*s.* 11*d.*, deposited with the defendants; and the said sums so paid into court are to be paid to such of the said parties as in the opinion of the Court are entitled to the same; the Court to be at liberty, if they shall please, to draw any inference as to the matters of fact which they shall think a jury ought to have drawn.

Martin, for the plaintiffs.—Upon the true construction of this charter-party, the plaintiffs, as assignees of the bankrupt charterers, are entitled to the possession of the goods without payment of the freight. The general rule is, that the right to freight arises on the true delivery of the cargo; but the time for payment of it is a matter of contract between the parties; and here they have expressly postponed the time of payment until the expiration of two months after the inward report. There are two clauses of the charter-party on which the question turns, and they appear to be somewhat inconsistent with each other. The first is, that the vessel shall deliver her cargo "on being paid freight at and after the rate of £4 per ton;" the other, that the freight is "to be paid on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom-house." The latter clause was plainly inserted in this charter-party for the very purpose of fixing the time of payment. And where

effect is to be given to two parts of such an agreement, which are apparently inconsistent, the Court will look at the *written* part of the contract as expressing the intention of the parties. [*Parke, B.*—That rule of construction is certainly laid down by Lord *Ellenborough* in *Robertson v. French (a)*.] The expressions introduced by the parties in the particular case must be considered as conveying their real intention.

1845.
 ALSAGER
 v.
 THE ST.
 KATHERINE'S
 DOCK CO.

Jervis, contra.—In considering this question, the language of the Warehousing Act, 3 & 4 Will. 4, c. 57, must be looked at in conjunction with the terms of the charter-party. That act enacts, by s. 47, that goods landed in docks, and lodged in the custody of the proprietors of the docks, shall, when so landed, be subject to such and the same claim of freight in favour of the masters or owners, as they were liable to when on board the ship. The question then is, whether the defendants are not entitled to a *lien* for the freight, or whether that lien is prevented from attaching by the agreement that payment shall be made in cash at two months after the inward report. Now there are undoubtedly cases in which the Courts, in construing policies of insurance and bills of lading, which are mercantile instruments that have acquired a settled form, have given greater effect to written words inserted in them, than to the printed part of the instrument; but no such rule is established with respect to charter-parties, in which the Courts endeavour, if possible, to give effect to all the words of the instrument: *Saville v. Champion (b)*. Now here the meaning of the first clause is plain—that the vessel is to deliver the cargo “on being paid freight for the same;” that is, on delivery. Then the other stipulation is, that “freight is to be paid on unloading and right delivery of the cargo, in cash, two months after the vessel’s inward report.” The

(a) 4 East, 136.

(b) 3 B. & Ald. 503.

1845.
 ALSAGER
 v.
 THE ST.
 KATHERINE'S
 DOCK CO.

word "delivery" there means delivery *free*, and the only effect of this clause is to fix the time within which *delivery* shall be made. On the other side, the clause is read as if the payment were to be made two months after *delivery*, whereas it is two months after the inward report. The owner ought not to be deprived of his right to the payment of the freight when earned, except upon the clearest declaration of an intention to the contrary. [He cited *Stevenson v. Blakelock* (a) and *Hutton v. Bragg* (b).]

Martin, in reply.—Looking to the whole of this contract, and particularly to the specific stipulation which the parties have themselves inserted in it, it is clear this is *debitum in præsentì, solvendum in futuro*—a debt due on the unloading of the vessel, but to be paid at a future day. The expression, "on being paid freight," qualified, as it must be, by the subsequent clause, cannot mean that the payment is a condition precedent to the unloading, but only that the freight then becomes a *debt*, to be paid at the time and in the manner afterwards provided for.

POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to the judgment of the Court. The question turns upon the construction to be given to this charter-party. Did the owner intend to abandon his lien, and receive payment of the freight two months after the inward report, or did he mean to retain his lien, and keep his right to refuse delivery of the cargo until the freight was paid? If the shipowner could not have refused to deliver the goods, provided the charterer had continued solvent, he cannot maintain that claim now. It has been contended that there is no difference in the construction to be given to the printed and the written words of an instrument of this nature, and that both are to be considered of equal force. I cannot assent to that argument. I have always under-

(a) 1 M. & Selw. 535.

(b) 2 Marsh. 339.

stood, that, in the case of policies of insurance partly printed and partly written, if there was any variance or inconsistency between the two parts, most regard was to be paid to the written part. We ought, no doubt, if possible, to give effect to both. Now I think the fair construction of the whole of this instrument is, that the shipowner is to be paid at a certain rate, and at a certain time, namely, £4 per ton, on right delivery of the cargo, two months after the inward report.

1845.
 ALSAGER
 v.
 THE ST.
 KATHERINE'S
 DOCK CO.

PARKER, B.—The question in this case turns entirely upon the construction of this charter-party. I give no opinion as to the different weight to be attributed to the written or printed words of the instrument; that would depend upon the usage of trade, and we have no evidence of such usage in this special case; and if the whole instrument were set out on the record, there would be no distinction between the written and the printed words, unless a statement to that effect were introduced. I may observe, however, that policies of insurance are instruments to which mercantile usage has assigned a certain meaning, and in their case the written part may reasonably be entitled to more weight than the printed. I come, therefore, to consider the language of this charter-party taken altogether; on which the question is, whether payment of the freight is to be contemporaneous with the delivery of the goods, or independent of it. Now the terms of the two clauses which have been referred to are clearly at variance, and therefore they must be qualified and explained to some extent. The first clause is, that the vessel may discharge in any dock, and deliver her cargo “on being paid freight” at £4 per ton. *Primâ facie*, then, the delivery and payment of freight are contemporaneous acts. But then, when we look at the context, and find that “freight is to be paid on unloading and right delivery of the cargo, two months after the vessel’s inward report,” it becomes impossible to

1845.
 ALSAGER
 v.
 THE ST.
 KATHERINE'S
 DOCK CO.

reconcile the clauses, and therefore the expression, "on being paid freight" &c., must be qualified, and must be read as if it had been "on payment of freight *as hereinafter mentioned*." The payment of freight is therefore irrespective of the delivery of the goods, as the payment is not to take place until two months after the inward report. The *prima facie* meaning of the words "on unloading and right delivery of the cargo" must also be qualified, and then the whole is made consistent, and the meaning of the charter-party is, that the payment of freight is irrespective of the delivery of the goods. No lien, therefore, existed in this case, and the plaintiffs are consequently entitled to the judgment of the Court.

ALDERSON, B., and ROLFE, B., concurred.

Judgment for the plaintiffs.

Nov. 19.

SLANEY v. SIDNEY and Others.

The Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1, does not apply in favour of a party who is sued by a person from whom he has bought goods, for the price, and also by third parties for the value of the goods in trover.

ATHERTON moved, on behalf of the defendants, for an interpleader rule, under 1 & 2 Will. 4, c. 58, s. 1. It appeared from the affidavits, that the defendants had agreed for the purchase of several chests of tea, the warrants for which were made out in the plaintiff's name. Before the time for payment arrived, they were served with a notice from third parties, that the tea warrants belonged to and had been improperly obtained from them, and requiring the defendants not to pay the price to the plaintiff: and the claimants subsequently brought an action of trover against the defendants for the conversion of the warrants. The plaintiff also brought this action of debt for the price of the tea. The defendants were ready to bring the money into court; and it was submitted, on their behalf, that

they ought to be relieved under the Interpleader Act against these conflicting claims. [*Pollock*, C. B., referred to *Farr v. Ward* (a). *Martin*, amicus Curiae, mentioned *Crawshay v. Thornton* (b).]

1845.
SLANEY
v.
SIDNEY.

POLLOCK, C. B.—I think there is no ground for a rule, and that the Interpleader Act does not apply to such a case as this. The decision of this Court in *James v. Pritchard* (c) is an authority in point. There the plaintiff had sold to the defendant a rick of hay, which was claimed by the administrator of a deceased person as part of his effects. The Court granted a rule; but, upon argument, it was decided that the case did not come within the Interpleader Act, for that a purchaser could not call upon his vendor to interplead with a third party; my Brother *Alderson* saying, “The defendant has made a bargain with the plaintiff, and he must perform it, or shew good cause why he does not.”

PARKE, B.—I am of the same opinion. How can it be said that the defendant does not claim “an interest in the subject-matter of the suit?” Besides, the parties cannot interplead here, for they do not claim the same thing; the one seeks to have the benefit of a contract, the other claims the value of the chattel which is the subject-matter of it. The plaintiff in this action claims the price agreed to be paid for the tea, which may be ten times its real value; while the plaintiffs in the other action only claim its real value, in the shape of damages for its conversion.

ALDERSON, B.—The Interpleader Act was intended as a substitute for the old mode of obtaining relief by bill in equity: now it is perfectly clear there would have been no interpleader in equity in such a case as this.

Rule refused.

(a) 2 M. & W. 844. (b) 2 Myl. & Cr. 1. (c) 7 M. & W. 216.

1845.

Nov. 24.

GASKELL v. SEFTON the Younger.

The term
"possession-
money" does
not include the
expense of the
keep of cattle
seized by the
sheriff.

ATKINSON had obtained a rule, calling upon one Webster, an officer of the Sheriff of Westmoreland, to shew cause why he should not refund to J. Sefton the elder the sum of three guineas, extorted from him under colour of a writ of fieri facias. It appeared from the affidavit, that, a fieri facias having issued against the goods of the defendant, Sefton the younger, under which the sheriff seized (amongst other things) several horses, Sefton the elder made a claim to the goods seized, whereupon the sheriff applied for relief under the Interpleader Act; and, on the 27th of August, *Platt, B.*, made an order in the following terms:—"That, upon payment of £30 into court by Sefton the elder within fourteen days from the date of the order, or upon his giving security for the payment of the same, and upon payment to the sheriff of the *possession-money* from the date of the order, the sheriff should withdraw from possession of the goods; that the plaintiff should pay to the sheriff the possession-money from the time of the seizure of the goods up to the day of the date of the order; and that Sefton the elder should pay the possession-money from the day of the date of the order until the said sum of £30 was paid by him into court, or security given; and, in default thereof, the sheriff to be at liberty to sell the goods, and pay the proceeds of the sale into court; and that a feigned issue be tried at the next assizes for Westmoreland, between Sefton the elder and the plaintiff in the original action, as to whether the goods, when seized, were the goods of the claimant." On the 1st of September, Sefton the elder paid £30 into court pursuant to the order; but the sheriff's officer refused to give up possession of the goods, unless he were paid, in addition to the possession-money, the sum of three guineas, which he charged for the

keep of the horses from the 27th of August: and Sefton accordingly paid this sum under protest.

1845.
GASKELL
v.
SEFTON.

S. Temple now shewed cause, and contended that the officer was entitled to be reimbursed the necessary expense of keeping cattle taken in execution. [*Pollock*, C. B.—The Master reports that he should have allowed this sum under the general words in the Table of Fees pursuant to the 1 Vict. c. 55, “for any duty not herein provided for.” *Alderson*, B.—But here the sheriff has wrongfully taken the goods of a third party; how can he have a claim for their keep?] It is not yet determined to whom the goods belong. [*Alderson*, B.—He has no right except under the order which he has himself obtained, and that directs him to deliver up the goods to the claimant on payment of the *possession-money*.] The question is, whether he has not a lien on the horses for the amount of their keep.

Atkinson, in support of the rule.—The question really is, what is the meaning of “possession-money?” Now that term has acquired a certain and definite meaning, applying solely to the expense of the man in possession. This is obvious from the items allowed in respect thereof by the Table of Fees. With respect to the allowance of other sums, under the words “for any duty not herein provided for,” that is only “upon special application” for the purpose: the Master has no authority *ex mero motu* to allow such expenses. The officer can have no right to claim these costs, except he be entitled to them under the Table of Fees, or under the Judge’s order. Until the sale of the goods, the general property in them remains as it was before, although the sheriff has such a special property in them as enables him to maintain trespass or trover.

POLLOCK, C. B.—The Court will do full justice between the parties when the feigned issue is disposed of; in the

1845.
 GASKELL
 v.
 SEFTON.

meantime the question is, whether the sheriff, who has been ordered to withdraw from the possession of goods on payment to him of "possession-money," has a right to make an additional charge for the keep of cattle. I think he has not. He might have applied for the expense of keeping these horses when all the parties were before the Judge; and then, if the learned Judge had thought it ought to be allowed, he would have made an order accordingly.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute, with costs.

Nov. 24.

GIBBS v. RALPH.

Where, upon the trial of a cause, a juror is withdrawn by consent of counsel, if the plaintiff afterwards bring another action for the same cause, the Court will stay the proceedings.

SHEE, Serjt., had obtained a rule, calling upon the plaintiff to shew cause why the proceedings in this action should not be stayed, with costs to be paid by the plaintiff, on the ground that it was brought contrary to good faith, a former action for the same cause having been terminated by the withdrawal of a juror at the trial. It was stated in the affidavit of the defendant's attorney, that a juror was withdrawn by the consent of the counsel on each side, and that there was a distinct understanding that all further proceedings should cease. The affidavit of the plaintiff's attorney, on the other hand, stated, that no such understanding existed, and that he was not aware that the withdrawal would preclude him from bringing a fresh action; that he was induced to consent to the withdrawal in consequence of the absence of his senior counsel; and that the defendant's attorney, on being subsequently informed by him that he intended to take the cause to trial again, expressed no surprise thereat, but

merely recommended him to be provided with a better witness. Against the above rule

1845.

GIBBS

v.

RALPH.

Horn now shewed cause.—The authorities shew that the withdrawal of a juror is no bar to a future action for the same cause, unless it be clear from all the circumstances of the case that both the parties intended it should have that effect: *Sanderson v. Nestor* (a), *Moscatti v. Lawson* (b). Now here it is plain, from the statements in these affidavits, that neither of the attorneys thought there was any legal impediment in the way of bringing a second action. There was no understanding that the withdrawal of a juror should be a final end of the cause; each attorney had his own reasons for withdrawing the case from the consideration of that particular jury.

Shee, Serjt., contrà, was stopped by the Court.

POLLOCK, C. B.—This is a very plain case. It must be taken as a positive rule of practice, that, when the parties to a cause agree to withdraw a juror, that puts a final end to the litigation between them, and no future action can be brought for the same cause. The counsel on both sides were of course aware of the consequences of that proceeding, and the understanding of the attorneys as to its effect is quite immaterial. All that the case of *Sanderson v. Nestor* decides is, that, if a second action be brought for the same cause, and the defendant, instead of applying to the Court to stay the proceedings, chooses to allow the action to proceed, he cannot avail himself of the withdrawal of a juror as a defence at the trial.

ALDERSON, B.—I have always understood it to be perfectly clear, that the withdrawal of a juror put an end to the cause. The parties are in the hands of their counsel,

(a) Ry. & M. 402.

(b) 1 Harr. & Wol. 572.

1845.
 GIBBS
 v.
 RALPH.

and when, by the concurrence of the counsel, that course is adopted, the parties are bound by it.

ROLFE, B., concurred.

Rule absolute.

Nov. 25.

In re STRETTON.

An attorney, on being retained to conduct a cause, gave his client, the plaintiff, the following undertaking:—
 “Should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only.”
 The plaintiff obtained a verdict, with damages and costs, but the defendant obtained his discharge under the Insolvent Debtors’ Act, and the plaintiff only received a dividend of about 7s. in the pound on the amount of his judgment:—*Held*, that the attorney was not, under these circumstances, limited by his undertaking to costs out of pocket only.

THIS was a rule, obtained by Mr. Stretton, an attorney, calling on the plaintiff to shew cause why the Master should not review his taxation of the said Stretton’s bill of costs, and why he should not be at liberty to disallow the costs of taxation. It appeared that Mr. Stretton had been retained by the plaintiff, Mr. Chester, to conduct a case of *Chester v. Chapman*, upon the following undertaking:—

“*Yourself v. Chapman.*”

“Sir,—Should the damages or costs not be *recoverable* in this action, under the circumstance I shall charge you costs out of purse only.

“Yours obediently,

“C. M. STRETTON.”

The plaintiff obtained a verdict in the action, with £600 damages; for which sum, together with 91*l.* 4*s.* 6*d.* costs, judgment was entered up: the defendant petitioned the Insolvent Debtors’ Court, and obtained his discharge, and a dividend of 272*l.* 3*s.* 4½*d.* was declared to be due to the plaintiff. This sum was considerably more than the amount of the attorney’s bill. The Master taxed Mr. Stretton’s bill, allowing him costs out of pocket only, but gave a certificate, with the view to taking the opinion of a Judge at chambers as to the cor-

The Master having taxed the attorney’s bill, allowing him costs out of pocket only, a summons was taken out and heard before a Judge at chambers, who directed the taxation to be as for costs out of pocket. Subsequently another summons to review the taxation was taken out, and heard before the same Judge, who dismissed it:—*Held*, that the attorney had a right to appeal from this decision to the Court.

rectness of the taxation. A summons was accordingly taken out, and heard before *Parke*, B., who directed the taxation to be as for costs out of pocket; the plaintiff to have the benefit of any dividend on the sum of 91*l.* 4*s.* 6*d.* On the 10th of June, Mr. Stretton took out another summons to review the taxation, which was dismissed by *Parke*, B., on the 18th of June.

1845.
In re
STRETTON.

Atkinson shewed cause.—First, the attorney having elected to appeal to *Parke*, B., against the former decision of the same learned Judge, he is precluded from a further appeal to the Court. *Thompson v. Becke* (a) is precisely in point to that effect. Mr. Stretton was at liberty to appeal against the order of *Parke*, B., either to the Court or to a Judge; having chosen the latter course, he is bound by the decision of the Judge thereon. [*Pollock*, C. B.—There has been no appeal against any order here: the second application to my Brother *Parke* was not by way of appeal from his former decision. *Alderson*, B.—The case you refer to is quite distinguishable; in that case the parties had put the Judge in the place of the Court; but the general rule is, that parties may always appeal from a Judge at chambers to the Court, unless precluded by act of Parliament, or by their own act. When parties come before me at chambers to ask me to rescind my own order, I generally ask them if they are willing that my decision shall be final; if they agree, the decision is of course binding upon them: but nothing of that kind appears to have taken place here.] Secondly, the damages and costs could not be said to have been *recoverable* in this case. The words “recoverable in this action” mean obtainable in the ordinary course of the cause; whereas here the plaintiff was merely entitled to receive a dividend on the amount of the judgment. [*Pollock*, C. B.—You must say, that, if the dividend had been 19*s.* 11*d.* in the pound, the attor-

(a) 4 Q. B. 759; 1 Dav. & Mer. 49.

1845.
In re
STRETTON.

ney would still have been entitled to charge costs out of pocket only.]

Peacock, contra.—In the first place, there is clearly no rule of practice which prevents a party, who has applied to a Judge at chambers to rescind a former order of his own, from appealing to the Court. If any such rule had existed, it certainly would have been applied in the case of *Thomas v. Evans (a)*, where the Court entertained the application, and disposed of it on a different ground. But, further, this was not an application to the learned Judge to rescind his own order, but to review the taxation. [He was then stopped.]

POLLOCK, C. B.—The rule must be absolute. This is a case to which no such rule of practice is applicable as is contended for by Mr. *Atkinson*. Then, as to the other part, the attorney did not mean to guarantee the solvency of the defendant, but merely that of the suit.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

(a) 9 M. & W. 829.

Nov. 25.

PERKINS v. ADCOCK.

Where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the Court will require security for costs.

THIS was a rule calling on the plaintiff to give security for costs. It appeared from the affidavits in support of the rule, that the plaintiff was in insolvent circumstances that in June last he assigned all his property, debts, and effects, including the debt for which this action was brought, to two trustees for the benefit of the general body of his creditors; that in July his attorney wrote a letter to the defendant, stating that such assignment had

been made by deed, and demanding payment of the debt to the trustees, and threatening proceedings if it were not paid to them by a day mentioned; and finally, that the present action was brought solely and entirely for the benefit of the trustees. The plaintiff's affidavit, in opposition to the rule, stated, that the deed of assignment did not convey all his property to the trustees, but that furniture and effects to the value of £200 had been expressly excepted out of it; that he had obtained a release from his creditors; that he had since set up in business for himself, and made some property; and that he was now solvent, and able to pay the defendant's costs, if the verdict in this action should go against him; and that the action was brought with his knowledge and consent.

1845.
PERKINS
v.
ADCOCK.

Ogle shewed cause.—The Court will not compel the plaintiff to give security for costs, unless they see clearly that the defendant is in danger of not obtaining them in the ordinary course. Now here the plaintiff shews that he has not assigned away all his property, and he swears that he is solvent, and able to pay the costs, if the defendant succeeds in the action. The rule is thus laid down in *Archbold's Practice*, p. 1056 (6th edit.):—"The Court will not require security for costs merely because the plaintiff is insolvent, even in a *qui tam* action, or where he has assigned the debt." In *Morgan v. Evans* (a), the Court refused to compel the plaintiff to give security for costs, although it appeared that he was insolvent, and that an action was brought in his name for the benefit of another person, who alone was beneficially interested. *Wray v. Brown* (b) and *Day v. Smith* (c) are authorities to the same effect. [*Pollock*, C. B.—In *Morgan v. Evans*, the Court seem to have considered that the action was really

(a) 7 Moore, 344.

Scott, 557.

(b) 6 Bing. N. C. 271; 8

(c) 1 Dowl. P. C. 460.

1845.
 PERKINS
 v.
 ADCOCK.

brought for the benefit of the plaintiff. *Alderson, B.*—
 And in *Wray v. Brown*, the judgment proceeded on the
 ground that the assignees were not really suing.]

P. M'Mahon, contra, having cited *Hearsey v. Pechell* (a),
 was stopped by the Court.

POLLOCK, C. B.—We think the rule must be absolute.
 I apprehend the principle is, that, where the nominal
 plaintiff is bankrupt or insolvent, or has assigned the debt,
 and is suing for the benefit of the assignee, he ought to
 give security for the costs.

ALDERSON, B.—In none of the cases cited by Mr. *Ogle*
 was the plaintiff shewn to be suing for the benefit of
 his assignee.

ROLFE, B., concurred.

Rule absolute.

(a) 7 Dowl. P. C. 437.

1845.

VACATION SITTINGS AFTER MICHAELMAS TERM.

RIGBY and Another v. The GREAT WESTERN RAILWAY
COMPANY.

Dec. 1.

COVENANT.—The declaration stated, that heretofore, to wit, on &c., by a certain indenture then made between the defendants and the plaintiffs, the defendants demised to the plaintiffs certain refreshment-rooms, &c., situate at Swindon, in the county of Wilts, for ninety-nine years, at Swindon for ninety-nine years, at the annual rent of 1*d.*; that the plaintiffs covenanted (inter alia) to keep the premises in repair, and not to carry on there any other business than that of the refreshment-rooms; and that the defendants covenanted with the plaintiffs, that, in case the Swindon station should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiffs on the terms therein mentioned; that it was by the said indenture *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by the plaintiffs in erecting the refreshment-rooms, the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return by the profits of the rooms; and that all trains carrying passengers, not goods trains or to be sent express for special purposes, which should pass the Swindon station, should, save in case of emergency or unusual delay arising from accident, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that the defendants covenanted with the plaintiffs not to do any act *which should have an effect contrary to the above intention*. The breach alleged was, that the defendants, whilst the Swindon station was used as the regular and general place of stoppage for the refreshment of passengers, did divers acts which had an effect and were contrary to the intention of the defendants in the said indenture; that is to say, they caused divers trains containing passengers, not being trains sent express, &c., to pass the Swindon station without stopping there for refreshment of the passengers for a reasonable period of ten minutes; and the defendants caused several trains to stop, and the same did stop, at Swindon, for a short and unreasonable time, to wit, for one minute and no more, the said period of time not being sufficient to enable the said passengers to obtain refreshment.

The defendants set out the deed on oyer, which corresponded with the statement of it in the declaration, except that the terms of the covenant declared on were, that the defendants *engaged* not to do any act which should have an effect contrary to the above intention.

Held, on demurrer, that this amounted to a covenant on the part of the Company not to do any act to prevent the trains from stopping at Swindon, so long as it was used as the regular refreshment station; and, secondly, that a good breach of that covenant was alleged in the declaration.

1845.
 RIGBY
 v.
 THE GREAT
 WESTERN
 RAILWAY CO.

the annual rent of 1*l.*; that the plaintiffs thereby covenanted with the defendants to complete the said refreshment-rooms, and that the business should be conducted in an orderly manner; and that the charges to passengers by The Great Western Railway for using the said refreshment-rooms should be fixed by the directors of the said company; that the plaintiffs would keep the premises in repair, and not carry on there any other than the business of the refreshment-rooms, and would insure the premises, &c.; and that the defendants covenanted with the plaintiffs, that, in case the Swindon station should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiffs at the full cost, in case the disuse should take place within five years from the date of the lease, but if afterwards, then at a fair price, to be settled by arbitration. The declaration then alleged, that it was in and by the said indenture *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by them the plaintiffs in erecting the said refreshment-rooms at Swindon, &c., the defendants should give every facility to the said plaintiffs for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment-rooms; and that all trains carrying passengers, not goods trains or trains to be sent express or for special purposes, and except trains not under the control of the said defendants, which should pass the Swindon station, either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes: and that the defendants covenanted with the plaintiffs not to do any act which should have an effect contrary to the above intention. The declaration then stated general performance by the plaintiffs of their covenants, &c., and alleged as a breach, that the defendants,

whilst the said Swindon station continued to be used by the defendants as the regular and general place of stoppage for the refreshment of passengers, to wit, on &c., did divers acts which had an effect and were contrary to the intention of the defendants in the said indenture; that is to say, that the defendants, on divers days and times &c., caused divers trains containing passengers, not being trains to be sent express, &c., to pass the Swindon station, without stopping there for the refreshment of the said passengers for a reasonable period of ten minutes, contrary to the tenor and effect, intent and meaning of the said indenture; and the defendants, on the days and times aforesaid, did cause several trains to stop, and the same did stop, at Swindon for a short and unreasonable time, to wit, for the space of one minute, and no more; the said period of time not being sufficient to enable the said passengers to obtain any refreshment from the said refreshment-rooms, contrary &c.

The defendants set out the indenture on oyer, which corresponded with the statement of it in the declaration; except that it appeared that the terms of the covenant declared on were, that the defendants thereby *engaged* not to do any act which should have an effect contrary to the above intention, &c. The defendants then demurred generally, and the plaintiffs joined in demurrer.

The point stated for argument by the defendants was, that the declaration did not disclose the breach of any covenant in the indenture, and was therefore insufficient in law.

Sir *T. Wilde*, Serjt., in support of the demurrer.—The breach in this declaration is not alleged as a breach of an express covenant to stop the trains for refreshment at Swindon, but as a breach of the covenant not to do any act which should have an effect contrary to the intention of the parties to the deed; which means their intention at

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

the time of entering into the
 then is, what was this intention?
 from all the terms of the deed.
 long term of ninety-nine years.
 doubt, will not vary the obligati
 but it is strong to shew that they
 variations in the circumstances a
 way during its continuance. Ev
 which contains mutual covenants
 but in this clause the word "eng
 the indenture contains a coven
 the Swindon station being *disuse*
 for refreshment, the defendants
 of purchasing the business on ce
 disuse of the Swindon station
 during the continuance of the le
 contemplation of the parties; whi
 with the supposition, that the d
 lutely to bind themselves for nin
 nant that the trains should stop
 and the *disuse* are inconsistent.
 nant on the part of the plaintiffs
 nor is there any averment in th
 were refreshments provided, or th
 them. No doubt, the word "en
 to operate as a covenant, if the
 the question here is as to wha
 clause seems as if it were only int
 existence of a bonâ fide intentio
 The intention must be the inte
 time, which does not necessarily
 is not satisfied by shewing that t
 wards departed from. The term
 more applicable to a mere engage
 bonâ fide had the intention at th
 any evasion defeat it, than to a p

the act. If it amounted to the latter, why did not the plaintiff allege a breach generally by not stopping? If the parties really alter their intention, by reason of subsequent circumstances rendering it inexpedient to carry it into execution, that is not properly doing an act to defeat their intention. The *abandonment* of the intention is a totally different thing from the doing an act contrary to the intention, which, for that purpose, is supposed to exist. Further, it is averred in the declaration that the trains did stop "for a short and unreasonable time, to wit, for the space of one minute." That would have been sufficient time to ascertain whether the passengers *required* refreshment, although not a convenient time in which to procure it; and if they did not require it, no time was necessary to enable them to procure it. The plaintiffs must shew a failure of the intention to enable them to obtain an adequate remuneration, which was the object of the deed. The exclusion of special and express trains tends to shew that the engagement has relation to the convenience of travellers, if *requiring* refreshments on the road.

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

Watson, contra, was stopped by the Court.

PARKE, B.—The questions in this case are, first, whether in this deed there is a *covenant* on the part of the company that the trains shall stop at the Swindon station; and, secondly, if there is, whether a good breach of that covenant is assigned in the declaration. I am of opinion that there is a covenant, and that the declaration assigns a good breach of it. With respect to what is a covenant in point of law, Sir *Thomas Wilde* has properly admitted that no particular form of words is necessary to constitute a covenant; wherever a party by deed obliges himself to do an act, that amounts in law to a covenant. Then the question here is, whether the company have by this deed obliged themselves to do or not to do a particular thing,

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

and what is the nature and amount of that obligation. The deed no doubt is, in this part of it, inartificially drawn. It is *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that, "in consequence of the outlay to be incurred by them in erecting the refreshment-rooms at Swindon, &c., the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment-rooms; and that all trains carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the defendants, which should pass the Swindon station, either up or down, should, save in the case of emergency or unusual delay arising from accidents, stop there for the refreshment of passengers for a reasonable period of about ten minutes." If there had been no other words than these, it might have been doubtful whether this was anything more than a declaration of intention on the part of the company, that certain things should be done; although, in some cases, a declaration of intention is quite enough to create a covenant: there are cases in the books of a declaration of an intention to levy a fine, which is said to amount to a covenant to levy a fine. But this particular part of the indenture does not stop here; there is an express engagement on the part of the company to do something; they "*engage*" (which has the same force as the word "covenant") "not to do any act which should have an effect contrary to the above intention," that is, they are not to do anything which shall have the effect of causing the trains carrying passengers not to stop at Swindon for a reasonable period for refreshment. That is the effect of this covenant taken by itself. They have not covenanted absolutely that all the trains shall stop; if they had made an absolute engagement to that extent, they would be liable, even though the trains did not stop in consequence of any

act of third persons, or if their own servants, although unintentionally, carried the trains by without stopping; but they protect themselves from that liability by these words, and the engagement on their part is, that they will not do anything to cause the trains not to stop at the appointed place, and wait there a reasonable time. But it is said that this construction is at variance with other covenants in the deed, particularly with that by which the company bind themselves, in case at any time Swindon should cease to be the general place of stoppage for refreshment, to buy out the plaintiffs on certain terms; and there is at first sight an apparent incongruity between these two covenants: but it is our duty so to construe this indenture, as, if possible, to give effect to all the stipulations in it; and I think we may do so by construing the covenant in question to be a covenant not to prevent the stopping of the trains at Swindon, so long as the company think fit to continue Swindon as the general place of stoppage for refreshment. The covenant does not oblige the company to cause all the trains, or any particular trains, to stop there, if they have determined that Swindon shall cease to be the place of stoppage; but, so long as they make that the general place of stoppage for refreshment, they are obliged to do nothing which may prevent the stopping of every train there, except those which come within the particular exceptions specified in the deed. By thus construing the covenant, we make both parts of the deed consistent. Then, in order to allege a proper breach of this covenant, it should be shewn in the declaration that the act of the company in stopping the trains took place while Swindon was continued as the general place of refreshment, and that is expressly averred. But then, it is said, there is no good breach, unless it is shewn that there were passengers in the trains who *required* refreshments. But I think it cannot be said that this is a covenant only to stop in case the passengers require refreshment, and give notice of it; that

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

1845.
RIGBY
v.
The GREAT
WESTERN
RAILWAY Co.

would be a very inconvenient arrangement. It seems to me that the covenant is an absolute covenant that the trains shall stop for ten minutes, to enable the passengers to obtain refreshment, if they choose to have it ; and, therefore, that a good breach of that covenant has been assigned. The plaintiffs are therefore entitled to our judgment.

ALDERSON, B.—I am of the same opinion ; and, as the case has been so fully gone into by my Brother *Parke*, I shall add only a few words. I think the intention of the covenant was, that the great bulk of the trains should stop, so long as Swindon continued to be the general place of stoppage ; and that they were not merely to stop for the purpose of ascertaining whether the passengers *required* refreshments, or on those occasions only when the passengers expressed their desire to stop. I think the meaning of the covenant is, that the defendants have undertaken to stop the trains, with a view to tender to the passengers the temptation of the plaintiff's refreshments. Then, with regard to the disuser, that is provided for by the previous clause. So soon as the company disused Swindon as the general place of refreshment, they would be liable, under their covenant with the plaintiffs, either to buy them out at what they had expended, if that event took place before five years, or, if not, by making a reasonable compensation.

ROLFE, B.—I am of the same opinion. With regard to the argument, that the parties ought not to be bound to have the trains stopped in the event of their buying up the interest of the plaintiffs in the Swindon station, I think my Brother *Parke* has explained that by shewing, that, by construing the clauses together, a qualified meaning is to be given to this covenant. But, even if it could not be construed consistently with the previous provision, the

parties have here entered into an absolute covenant ; and though they did not contemplate the inconvenience that might arise from a change of circumstances, they must be bound by that covenant.

1845.
 RIGBY
 v.
 The GREAT
 WESTERN
 RAILWAY Co.

PLATT, B.—I think, when the parties use the word “intention,” they must be understood to have entered into a covenant, the effect of which is, that all trains carrying passengers, with certain exceptions, shall stop at Swindon for the refreshment of passengers “for the reasonable time of ten minutes ;” and then, where the company go on to engage “not to do any act which shall have an effect contrary to the above intention,” that is, contrary to the meaning of the covenant, it must be considered that to compel the trains, or any of them, to pass by the station after that, is doing an act contrary to the meaning of the covenant. I think the part of the deed I have alluded to has been introduced to meet an intermediate case between the entire disuser of the place as a general refreshment-room, and a partial infringement of the use of it. Anything that would amount to a total disuser is provided for by the previous clause, and would enable the plaintiffs to demand the value of the buildings, &c. ; but anything short of that was intended, as it seems to me, to be met by this covenant. I therefore think there is an intelligible engagement on the part of the company, that it has been infringed, and that the breach of it is properly stated upon the record.

Judgment for the plaintiffs.

1845.

Dec. 2.

WEBB and Wife, Executrix of JERVIS, deceased,
v. COWDELL.

In assumpsit, the first count of the declaration alleged that F. was indebted to the plaintiff, as executrix, in £350, secured on mortgage; that the plaintiff, as executrix, had commenced proceedings at law against F., which were pending, and had been put to divers costs in such proceedings, &c.; and thereupon, in consideration of the premises, and that the plaintiffs would stay the proceedings against F. for twenty-one days, the defendant undertook and *promised the plaintiff*, that, within the twenty-one days, he would pay the £350, and the plaintiff's costs. Averment, that the plaintiff did stay the proceedings accordingly, and breach in non-payment by the defendant to the plaintiffs of the mortgage-money and costs. The second count was upon an account stated with the plaintiff as executrix:—*Held*, a misjoinder.

ASSUMPSIT.—The first count of the declaration stated, that, before and at the time of the making of the promise by the defendant thereafter mentioned, one Joseph Freeman was indebted to the plaintiffs, George Webb and Maria his wife, as such executrix as aforesaid, in £300, and interest thereon, making together £350, which monies were then secured by a mortgage of certain property. And whereas the plaintiffs, George Webb and Maria his wife, as such executrix, had then, for the recovery of the said monies and interest, commenced certain proceedings at law against the said Joseph Freeman, and which proceedings were then pending; and the plaintiffs, George Webb and Maria his wife, as such executrix as aforesaid, had then incurred and been put to divers costs, &c. in and about such proceedings, and in and about endeavouring to effect a sale of the property comprised in the said mortgage, under certain powers of sale therein contained, and in investigating the title of the said property in reference thereto; and thereupon, heretofore, to wit, on &c., in consideration of the premises, and that the plaintiffs, at the request of the defendant, would stay the said proceedings so commenced against the said Joseph Freeman for twenty-one days from the day and year last aforesaid, and would, during that period, forbear and give time to the said Joseph Freeman for the payment of the said sum of £300 and interest, he the defendant then undertook and *promised the plaintiffs*, that, within the said period of twenty-one days, he would pay or cause to be paid to the plaintiffs the said sum of £300, together with interest thereon up

to the day of payment, and also all costs, &c. which the plaintiffs had at any time theretofore incurred, or which they might thereafter incur or be put unto by reason or on account of or relating to the matters aforesaid, and of the said undertaking of the defendant. The count then averred, that the plaintiffs did stay the proceedings accordingly for twenty-one days, and alleged as a breach the non-payment by the defendant to the plaintiffs of the £300 and interest, and the costs, charges, and expenses, incurred by the plaintiffs in and about the said proceedings so commenced by them as aforesaid, &c., and which costs, &c. the plaintiffs aver amount to a large sum, to wit, £100.

1845.
 WEBB
 v.
 COWDELL.

The second count stated, that the defendant was indebted to the said George Webb and Maria his wife, as such executrix as aforesaid, in £500, for money found to be due from the defendant to the plaintiffs, George Webb and Maria his wife, as such executrix as aforesaid, on an account then stated between them, and alleged a promise to pay to the plaintiffs, George Webb and his wife, as executrix.

Special demurrer, on the grounds (inter alia), 1st, of a misjoinder of counts, the first count being on a promise made by the defendant to the plaintiffs in their personal character, and the last count on a promise made to them in their representative character; 2ndly, for not shewing that the defendant had any notice of the several matters which are involved in the consideration of the promise therein contained, under the terms "the premises."—Joinder in demurrer.

G. T. White, in support of the demurrer, having cited *Henshall v. Roberts* (a), was stopped by the Court, who called upon

Watson to support the declaration.—The rule established by the case of *Cowell v. Watts* (b) is, that, if the money

(a) 5 East, 150.

(b) 6 East, 405.

Exchequer, wherein the plaintiff, as such public officer, was plaintiff, and the now defendant was defendant, for the recovery of certain monies alleged to be due from the defendant to the banking company, upon three promissory notes alleged to have been made by the defendant, in which said action the plaintiff duly declared, and, by the first three counts of the declaration, charged the now defendant as the maker of three several promissory notes, for the payment of £40, £40, and 46*l.* 4*s.* 6*d.*; and, the defendant having pleaded thereto, certain issues were joined thereon. The declaration then set forth an order of *Cresswell, J.*, dated 22nd August, 1844, referring the said cause and all matters in difference between the parties, to the arbitration of one J. Sangster. It then alleged, that there were not any matters in difference between the parties, except those in the cause; and that, on the 22nd October, 1844, Sangster made and published his award in writing of and concerning the said premises, and did thereby award, order, and direct, that the defendant was the maker of the three several promissory notes mentioned and set forth in the three first counts of the declaration; and that there was then due and owing from the defendant to the plaintiff, in respect of the said three promissory notes, the sum of 66*l.* 4*s.* 6*d.*; and that the defendant should pay to the plaintiff the said sum of 66*l.* 4*s.* 6*d.* on the 1st November then next; and that one moiety of the costs of the reference and award should be paid by the plaintiff, and the other moiety thereof by the defendant; of all which said award the defendant afterwards, to wit, on &c., had notice. The declaration then stated, that the order was made a rule of court, and that the costs of the action were taxed at 43*l.* 16*s.* 6*d.*, of which the defendant had notice; and alleged as a breach the non-payment of the sums of 66*l.* 4*s.* 6*d.*, and 43*l.* 16*s.* 6*d.*, or either of them, or any part thereof.

There were also counts for money lent, and on an account stated.

1845.
DRESSER
v.
STANSFIELD.

1845.
 DRESSER
 v.
 STANSFIELD.

Third plea, to the first count: That the plaintiff duly declared in the said action, as in the first count of the declaration mentioned, and that the declaration in the said former action contained not only the three counts above in the first count of the declaration in this action mentioned as charging the defendant as the maker of the said three promissory notes, but also a fourth and last count, in which the plaintiff charged the defendant as having been indebted to the said company in £200 for money found to be due from the defendant to the said company on an account stated between the defendant and the said company, and with having promised to pay the said sum of £200 to the said banking company, and with not having paid the said sum of £200, or any part thereof. That, after the plaintiff had so declared in the said former action, to wit, on the 20th day of July, 1844, he the defendant pleaded to the first count of the declaration in the said former action, first, that he the defendant did not make the note in the said first count of the declaration in the said former action mentioned; and to the second count of the declaration in the said former action, first, that he the defendant did not make the note in the second count of the declaration in the said former action mentioned; and to the third count of the declaration in the said former action, first, that he the defendant did not make the note in the said third count of the declaration in the said former action mentioned; concluding the said three pleas respectively by therein stating respectively, that the said defendant put himself thereof upon the country. That, to the first, second, and third counts of the declaration in the said former action, the defendant then, to wit, on the day and year last aforesaid, pleaded a second plea, therein and thereby alleging, that, before the said promissory notes in the said first, second, and third counts of the declaration in the said former action mentioned respectively became due and payable, and after the making of the said notes respectively, and after the making of the

1845.
 DRESSER
 v.
 STANSFIELD.

three several indorsements of the said three notes in the said first, second, and third counts of the declaration in the said action mentioned, the defendant paid to the said banking company, and the said banking company accepted and received of and from the defendant, divers sums of money, amounting to a large sum, to wit, £100, in full discharge of all the defendant's liabilities to the said banking company to pay to the said banking company the said notes respectively, and every part of the amount of them, or any or either of them, as the maker and indorser thereof, when they should respectively become due, and of the defendant's promises respectively to the said company to pay the same, and every part of the amount thereof; and that, after the time of the said payment and acceptance, no fresh liability accrued to the defendant, whereby the defendant became liable to pay the said notes, or any or either of them, or any part of the amount of them, or either of them. That, to the said last count of the said declaration in the said former action, the said defendant then, to wit, on the day and year last aforesaid, pleaded, first, that he did not promise in manner and form as the plaintiff in his said last count of the declaration in the said former action alleged; and then concluded the said last-mentioned plea by therein stating that he put himself thereof upon the country. And to the last count in the declaration in the said former action, the defendant then, to wit, on the day and year last aforesaid, pleaded a second plea, therein and thereby alleging, that, after the accruing of the said cause of action in the said last count of the declaration mentioned, and before the commencement of the said former action, the defendant paid to the said banking company, and the said banking company then accepted and received from the defendant, divers sums of money, amounting to a larger sum, to wit, to the amount of the monies in the last count of the declaration in the said former action mentioned, in full satisfaction and discharge of the said cause of action in

1845.
DRESSER
v.
STANSFIELD.

the last count of the declaration in the said former action mentioned, and also of all damages sustained by the said banking company by reason thereof. And the plaintiff afterwards, to wit, on the 24th day of July, 1844, joined issue on the said four pleas whereof the defendant had so put himself upon the country as aforesaid; and to the said second plea pleaded by the defendant to the first, second, and third counts of the declaration in the said former action, the plaintiff then, to wit, on the day and year last aforesaid, replied, stating in his said replication thereto, that the defendant did not pay to the said banking company, nor did the said banking company accept or receive of or from the defendant, the said monies in that last-mentioned plea mentioned, in such discharge as therein mentioned, in manner and form as the defendant had in that behalf alleged, concluding the said replication by therein stating that the plaintiff prayed that the same might be inquired of by the country. That the plaintiff then, to wit, on the day and year last aforesaid, joined issue on the said first plea to the last count of the declaration in the said former action. That the plaintiff then, to wit, on the day and year last aforesaid, replied to the said second plea to the said last count of the declaration in the said former action, stating in his said replication thereto that the defendant did not pay to the said banking company, nor did they accept or receive from the defendant, the said monies in that last-mentioned plea mentioned, in such satisfaction or discharge as therein alleged; concluding the last-mentioned replication by stating that he (the plaintiff) prayed that the same might be inquired of by the country. That the defendant afterwards, to wit, on the day and year last aforesaid, joined issue on the said two replications which the plaintiff had so prayed might be inquired of by the country as aforesaid. And the defendant further says, that the said issues so joined as in this plea aforesaid, were so joined before the making of the

said order by the said Sir *Cresswell Cresswell*, and were issues mentioned in the declaration in this cause as having been joined in the said former action; all which said issues were, at the time of the making of the said order, and from thence until and at the time of the making of the said award, existing issues in the said former action, and undetermined, and matters in difference in the said cause between the now plaintiff and the now defendant; and that, save as in the declaration is above alleged, the said John Sangster did not, by the said supposed award, arbitrament, final end and determination, award any matter or thing whatsoever. And the defendant says that the said supposed award was and is void.—Verification.

1845.
DRESSER
v.
STANSFIELD.

Special demurrer, assigning for causes, 1st, that the plea is an argumentative traverse, either of the averment in the declaration that the said J. Sangster made his award of and concerning the premises, or of the averment that there were not any other matters in difference between the parties, except the matters in difference in the cause; 2ndly, that the plea attempts to raise an issue of fact on matter of law; and, 3rdly, that, admitting the facts alleged in the plea to be true, it is not a sufficient answer to the action.—Joinder in demurrer.

Hugh Hill, in support of the demurrer.—This plea is in effect an argumentative and circuitous plea of nul agard. The facts stated in it would be admissible in evidence under that plea, and would invalidate the award: *Gisborne v. Hart* (a). *Parke*, B., there says, "The issue is, whether there is a valid award of and concerning the matter referred. The plea of 'no award' means 'no award according to the submission,' as was said by *Bayley*, J., in *Fisher v. Fimbley* (b). It means no *valid* award." Here the declaration distinctly avers that Sangster made and

(a) 5 M. & W. 50.

(b) 11 East, 193.

1845.
 DRESSER
 v.
 STANSFIELD.

published his award of and concerning the premises referred to him. That means a complete award, including everything referred, though not specifically noticed in the award. In *Muntz v. Foster* (a), a plea to a declaration in case for infringement of a patent, that the plaintiff caused to be inrolled in Chancery, within six calendar months after the date of the letters-patent, a certain instrument in writing in the words and to the effect following; (setting it out in hæc verba); and that the plaintiff caused to be inrolled in Chancery, within six calendar months &c., no instrument in writing other than and except the said instrument in writing thereinbefore set forth, whereby the letters-patent ceased and determined, and became of no force and effect, was held bad, on the ground that it amounted to an argumentative traverse of the inrolment, alleged in the declaration, of a specification, in compliance with the proviso in the letters-patent. *Hickes v. Cracknell* (b) is also an authority for the plaintiff.

Watson, contra.—The plea is good. The case differs from that of *Fisher v. Pimbley*, because there the award was bad on the face of it. Here the reference is, “of and concerning the *said* premises;” that is, the three promissory notes. That does not shew that those were the only matters in difference in the cause. [*Parke, B.*—There is one matter in difference in the cause which the arbitrator has not disposed of; and the question is, whether that may be taken advantage of under the plea of no award, or whether the defendant must plead it specially.] To this declaration he must. If the cause had gone to trial, the plaintiff would have succeeded on the plea of no award, by merely proving the rule of reference and the award. [*Parke, B.*—No doubt, as we held in *Gisborne v. Hart*, that would be a *primâ facie* case, but it may be

(a) 6 Man. & G. 734; 7 Scott, N. R., 471.

(b) 3 M. & W. 72.

answered.] An error of this nature in an award has always been pleaded specially. Thus, in *Mitchell v. Stavelly* (a), to debt on bond conditioned to perform an award under a reference of all matters in difference between the parties, a plea shewing that there was a matter in difference on which the arbitrator had not awarded, was held good. [Alderson, B.—There there was a *prima facie* case by the bond, which the defendant was to answer by shewing an award which was invalid. Parke, B.—The objection there came from the party who stated the award. That case is certainly no authority for you.] The facts were pleaded specially in *Gisborne v. Hart*, and also in *Duckworth v. Harrison* (b). [Alderson, B.—There was no demurrer on that ground in either of those cases.] The defendant here confesses an award in fact, and avoids it by shewing that the arbitrator has omitted to award on a matter in difference. It would be very inconvenient that such a defence should not be pleaded, for then the objection is for the first time sprung upon the plaintiff at the trial without notice, although he has an award perfectly good on the face of it. All that was decided in *Fisher v. Pimbley* was, that a plea of no award meant no valid award *on the face of it*: and *Hickes v. Cracknell* and *Muntz v. Foster* go to the same extent only.

But, secondly, this declaration is bad, for it does not shew a sufficient award. The arbitrator has not disposed of the several issues in the cause. [Alderson, B.—If there were no issues except upon the counts on the promissory notes, all are disposed of. Having nothing but the declaration, are we not, on general demurrer, to infer that there were no other issues?] The plaintiff ought to shew what were the issues, in order to shew that they are all disposed of. [Parke, B.—It is not necessary to dispose of each issue specifically, if the arbitrator uses words which shew that all

1845.
DRESSER
v.
STANSFIELD.

(a) 16 East, 58.

(b) 4 M. & W. 432.

1845.
DRESSER
v.
STANSFIELD.

are disposed of; as a "general verdict" for the plaintiff means a verdict on all the issues.

Hill was not called upon to reply.

PARKE, B.—There can be no doubt that the declaration is good on general demurrer. Then the plea is bad, as being an argumentative denial of the award. The award is alleged to have been made of and concerning the premises referred, that is, the cause, which means the issues in the cause. It being alleged that there were no matters in difference between the parties except those in the cause, then, in order to make the award good and valid, it must be made on all the matters in difference, that is, on all the issues in the cause. Therefore, a plea, that there was no award, that is, no valid award, sufficiently raises this objection. To make this plea good, it ought, at all events, to have concluded with a traverse, and so that there was no award of and concerning the premises. The case is substantially decided by *Gisborne v. Hart*.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

1845.

STEELE v. HARMER, BENHAM, and LAXTON.

Dec. 5.

ASSUMPSIT on a bill of exchange, dated 3rd of December, 1839, drawn by William Wood upon and accepted by the defendants, for payment to the order of the said William Wood, six months after date, of £400, value received in final settlement of accounts to that date; and indorsed by William Wood to the plaintiff. There was also a count on an account stated.

The defendants Benham and Laxton (the defendant Harmer having let judgment go by default) pleaded to the first count, among other things, as follows:—

Fourth plea: That, after the defendants had accepted the said bill, and before it became due, and before it was so indorsed to the plaintiff as in the declaration mentioned, to wit, on the day and year in the declaration mentioned as the day and year when the said bill was ac-

Assumpsit on a bill of exchange, drawn by W. on, and accepted by, the defendants, payable to the order of W. six months after date, and indorsed by W. to the plaintiff.

One of the defendants (H.) let judgment go by default: the other defendants pleaded, that, after they accepted the bill, and before it became due, and before it was indorsed to the plaintiff as in the declara-

tion mentioned, W. waived the acceptance of the bill, and exonerated and discharged the defendants from the same, and from the payment of the bill; and that no person ever gave or received any consideration for the said indorsement. Another plea differed from the above only in stating, as the concluding averment, that the bill was indorsed to the plaintiff after it became due: *Held*, on special demurrer, that these pleas were bad, for not shewing that W. was the holder of the bill at the time of the alleged waiver by him.

Another plea stated, that, after the making and accepting of the bill, and before it became due, it was delivered, so accepted by the defendants, to W.; and that, while W. was the holder and payee, and before it became due, W. indorsed it to the defendant H., and delivered it so indorsed to H., with the intention of divesting himself, and whereby he did divest himself, of all right, title, and interest in and to the bill, and of the right of suing thereon, and of indorsing the same again; that the bill was so indorsed to H. for a valuable consideration; that H. continued to be the holder of the bill from the time of the said indorsement thereof to him by W., until it was delivered by H. to the plaintiff; that the indorsement in the declaration mentioned consists merely of the last-mentioned delivery by H. to the plaintiff of the bill, so indorsed by W., and that it never was indorsed by W. otherwise than in this plea mentioned; and that, when it was so delivered by H. to the plaintiff, he had notice and knowledge of all the matters in this plea mentioned. There were other pleas, which differed from the above only in stating (instead of the allegation of notice) that there was no consideration for the delivery of the bill to the plaintiff, and that it was delivered to him after it became due: *Held*, on special demurrer, that these pleas were bad, as amounting to an argumentative traverse of the indorsement to the plaintiff.

The directors of a company incorporated by act of Parliament for making a cemetery, being empowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be requisite to be done and transacted for the direction and management of the affairs of the company, are not thereby authorised to raise money for the purposes of the undertaking, by accepting or indorsing bills of exchange.

1845.
STEEL
v.
HARMER.

cepted by the defendants, the said William Wood waived the said acceptance of the said bill, and exonerated and discharged the defendants from the same, and from the payment of the said bill; and that no person ever gave or received any consideration for the said indorsement.

Fifth plea: Same as the fourth, but alleging that the bill was indorsed to the plaintiff after it became due.

Seventh plea: That, at the said respective times when the said bill was respectively made and directed to, and accepted by, the defendants, the defendants were the directors of the Gravesend and Milton Cemetery Company, being the company mentioned in the act of Parliament made and passed in the first year of the reign of her Majesty Queen Victoria, which is intituled "An Act for establishing a general Cemetery in the parish of Gravesend, in the county of Kent;" that, at the said time when the said bill was directed to the defendants, it was directed to them as and by the style of the directors of the said company; and that, at the said time when the said bill was accepted by the defendants, it was accepted by them by the style of the directors of the said company; and that, at the said time when the said bill was accepted by the defendants, it was accepted by them as such directors of the said company, pursuant to the said act, on behalf of the said company, and for and on account of a debt then due and payable from the said company to the said William Wood; which debt, after the passing of the said act, and before the making and accepting of the said bill, to wit, on the 1st day of January, 1839, had been contracted by the said company with the said William Wood, under and by virtue of the powers of the said act; of all which premises the said William Wood always had notice, and of all which premises in this plea mentioned the plaintiff, before and at the said time of the said indorsement of the said bill to the plaintiff by the said William Wood, had notice and knowledge.—Verification.

The eighth and ninth pleas were similar to the seventh, except that, instead of alleging notice to the plaintiff, the former alleged that no person gave or received any consideration for the indorsement by Wood; and the latter, that the bill was indorsed by Wood to the plaintiff after it became due.

Tenth plea: That, after the making and accepting of the said bill, and before the said bill became due, to wit, on the day and year in the said first count mentioned as the day and year when the said bill was accepted, the same was delivered, so accepted by the defendants, to the said William Wood; and the defendants say, that, after the said bill was so accepted and so delivered as aforesaid, and while the said William Wood was the holder and payee thereof, and before the said bill became due, to wit, on the day and year last aforesaid, the said William Wood indorsed the said bill to the defendant James Harmer, and then delivered the said bill so indorsed to the said James Harmer, with the intention of divesting himself the said William Wood, and whereby the said William Wood did divest himself the said William Wood, of all right, title, and interest of, in, and to the said bill, and of the right of suing thereon when the same should become due, and of indorsing the same again. And the defendants further say, that, when the said bill was so indorsed to the said James Harmer, it was indorsed for a good and valuable consideration then therefore paid by the said James Harmer to the said William Wood in that behalf, to wit, the sum of £380. And the defendants say, that the said James Harmer continued to be and was the holder and possessor of and the person entitled to the said bill, always from the time of the said indorsement thereof by the said William Wood until the same bill was afterwards, to wit, on the 1st day of January, 1845, delivered by the said James Harmer to the plaintiff. And the defendants say, that the indorsement in the declaration mentioned consists merely

1845.
STEEL
v.
HARMER.

1845.
STEEL
v.
HARMER.

of the last-mentioned delivery by the said James Harmer to the plaintiff of the said bill so indorsed by the said William Wood, and that the said bill was never indorsed by the said William Wood otherwise than as in this plea mentioned; and that, before and at the said time when the said bill was so delivered to the plaintiff by the said James Harmer, the plaintiff had notice and knowledge of all the facts, matters, and things in this plea mentioned.—Verification.

The eleventh plea differed from the tenth only in stating (instead of the allegation of notice) that no person ever gave or received any consideration for the said delivery of the bill to the plaintiff so indorsed as aforesaid.

The twelfth plea was also similar to the tenth, except that it alleged that the bill was delivered so indorsed by Harmer to the plaintiff *after it had become due and payable*, to wit, on &c.

The plaintiff demurred specially to all the above pleas. The causes of demurrer stated as to the fourth and fifth pleas were (in substance), that it was not alleged in them, that Wood, at the time he waived the acceptance of the bill, and exonerated and discharged the defendants from the payment thereof, as in those pleas mentioned, was the holder of the bill, or was otherwise so situated as to make such waiver, &c. of any force or effect; it being perfectly consistent with the pleas, that, at the time of such waiver, &c., Wood had parted with the possession of and all control over the bill, by indorsing, delivering, or assigning it to some person other than the plaintiff, or otherwise. That it was not specifically stated in the pleas *how* or in what way Wood waived the acceptance, &c.; and if it was meant that such waiver, &c. was effected by some contract or agreement, then, inasmuch as the bill was, upon the face of the first count, an inland bill of exchange, the acceptance whereof was required to be in writing, such contract or agreement, in order to have effected such waiver,

&c., ought to and necessarily must have been a contract or agreement in writing, and should have been alleged in the pleas to be such.

The causes of demurrer as to the seventh, eighth, and ninth pleas, were, that the defendants had not, either as directors of the company mentioned in those pleas, or in the capacity of directors thereof, any right, title, or authority, under the statute therein mentioned, to accept the said bill for the purposes and in the manner in the pleas mentioned; and that the said pleas professed to be pleas in confession and avoidance, but in fact amounted to and were pleas in denial of the acceptance of the bill, and should therefore have concluded to the country, and not with a verification, &c.

The causes of demurrer as to the tenth, eleventh, and twelfth pleas, were, that the allegation in those pleas, that Wood indorsed and delivered the bill to the defendant Harmer, with the intention of divesting himself, and whereby he divested himself, of all right, title, and interest of, in, and to the bill, &c., is mere surplusage, immaterial, and insensible, and is a mere inference of law, viz. that which arises from the fact of an indorsement in blank. That these pleas furnished no answer to the declaration, inasmuch as it was not alleged in them that the bill was accepted by the defendants without consideration, or that Wood was the drawer, payee, and holder thereof without consideration; and, even assuming that the defendant Harmer could not have sued the acceptors on the bill as the indorsee of Wood, yet the mere fact of the bill having passed through the hands of the defendant Harmer for a good consideration is wholly immaterial, and is in no way a discharge of the liability of the defendants to be sued thereon by the plaintiff as the indorsee of Wood, or to paying him (the plaintiff) the full amount of the bill; and that the pleas profess to be pleas in confession and avoidance, but in fact amount to and are pleas in denial of the

1845.

STEELE
v.
HARMER.

1845.
 STEELE
 v.
 HARMER.

indorsement of the bill in the first count mentioned, and should therefore have concluded to the country, and not with a verification, &c.

Joinder in demurrer.

Martin argued in support of the demurrers (*Dec. 2*).—Three points arise in this case:—First, with respect to the fourth and fifth pleas, they are manifestly bad, for want of an averment, that, at the time of the alleged waiver of the defendants' liability by Wood, the payee, he was *the holder* of the bill. Besides, it is impossible to understand what is a "waiver, exoneration, and discharge" of the acceptance of a bill of exchange. [*Parke, B.*—It is quite consistent with the pleas, that Wood may have indorsed the bill in blank, that it may have passed through twenty hands before it got to the plaintiff, and that the alleged waiver was during that time. To make it good for anything, he must be the holder of the bill at the time.]

Secondly, the seventh, eighth, and ninth pleas are bad in substance. They are founded upon the supposition, that the defendants, as directors of the Gravesend Cemetery Company, were empowered by the act of Parliament by which it was incorporated (1 & 2 Vict. c. xxxv) to accept bills for the payment of debts incurred by the company. That question depends upon the 46th and 47th sections of the act. The 46th defines the duties and powers of the directors, and empowers them "to do all acts whatever which the said company are by this act authorized to do (except as hereinafter mentioned) for the management and direction of the affairs of the said company; and for that purpose" to purchase lands, &c. for the purposes of the act, to appoint and displace officers, &c., and "to make contracts and bargains touching the said undertaking, and to regulate the mode of interment in the said cemetery, and the disposition of catacombs, vaults, and graves, and of the sums to be paid for the purchase of the exclusive right of interment therein, or for the right or privilege of making

or erecting vaults and graves, and of being interred therein, and of the sums to be paid for single interments, and for the privilege of placing monuments or tablets in the said chapel or chapels, or in any other part of the said cemetery, and to do and transact all other matters and things which shall be requisite to be done and transacted for the direction and management of the affairs of the said company and the said directors." Then sect. 47 enacts, that none of the directors shall, by reason or on account of his being party to, or making, signing, or executing, in his capacity of director, any contract or other instrument for and on behalf of the company, or otherwise lawfully executing any of the powers and authorities given to the directors by that act, be liable to be sued, prosecuted, or impleaded, either collectively or individually, &c.; but in every such case, any person making any claim or demand upon the company, or upon any directors thereof, by virtue of any such contract or instrument, or other lawful act, may sue the company in like manner as if such contract, instrument, or other act had been entered into and executed and done under the common seal of the company. Now it is clear from these sections taken together, that it is only where the contract or instrument received would have been valid, if made or executed by the company under its common seal, that the directors can discharge themselves from individual liability under sect. 47. And there is nothing in the act enabling the company to raise money by accepting bills, although they may, by sect. 34, raise money on the credit of the undertaking by *mortgage*; nor is it incidental to the constitution or necessary to the existence of such a company, that it should have power to bind the members by drawing or accepting bills: it is not so alleged, and the Court will not presume it: *Dickinson v. Valpy* (a). The words "contracts and bargains touching the said un-

1845.
 STEELE
 v.
 HARMER.

(a) 10 B. & C. 128.

1845.
 STEELE
 v.
 HARMER.

undertaking," in sect. 46, may be
 ants; but they cannot mean co
 of bills, but contracts for the
 employment of workmen, and o
 the carrying of the undertaking
 —The limited power of the dir
 do all acts whatever which the
 act authorized to do for the ma
 the affairs of the company," and
 other acts afterwards specified.]
 ance of a bill of exchange by suc
 distance of sixty-five miles fro
 valid, as being a violation of the
 England, under the 58 Geo. 3,
 c. 98: *Broughton v. Manchester*
 The directors, when they seek t
 primâ facie is upon themselves, r
 bill as would bind the corporate
 in *Slark v. The Highgate Archw*
 of Common Pleas seemed to t
 authority was given by the act
 to make bills or notes eo nomin
 bind itself except by deed.

Lastly, the tenth and following
 stance. The question raised by
 of the indorsement to and disco
 the acceptors. That is an impor
 is no direct authority. It mu
 what is the nature of the contrac
 exchange, and what by law of
 liability upon it. Now the cont
 pay the bill, when due, to any ho
 ment, provided no previous holde
 No doubt, so long as the defend

no action could be maintained upon it against the acceptors, because the plaintiff and defendant must be different persons; but it does not therefore follow that the negotiable character of the bill is thereby annihilated, and cannot be revived in the hands of another person. *Richards v. Richards* (a) was a stronger case than the present. There a married woman, being an administratrix, received money in that character, and lent it to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest; and it was held, that, after the husband's death, the wife might sue upon it against either of the other makers. [Parke, B.—We had this question before this Court some years ago and held that the only difficulty was the technical one, which arose from the circumstance of the same party being plaintiff and defendant; but that, as soon as that was removed by the indorsement of the bill to another person, no objection remained (b).] The acceptor cannot buy the bill and become the holder in a different right, and thereby extinguish the liability upon it. Even if the circumstances amount to a covenant not to sue Harmer on the bill, that is no bar to the action as to the other parties liable as acceptors.

These pleas are also bad, on the ground that they amount to an argumentative traverse of the indorsement to the plaintiff: *Marston v. Allen* (c).

Jervis, contra.—First, as to the sufficiency of the fourth and fifth pleas. Taking the declaration and the pleas together, it is sufficiently alleged that Wood was the holder of the bill at the time of the waiver of liability by him. The declaration states, that Wood drew the bill upon the defendants, and that they accepted it payable to his order,

1845.
STEELE
v.
HARMER.

(a) 2 B. & Adol. 447.

& W. 174.

(b) *Morley v. Culoerwell*, 7 M.

(c) 8 M. & W. 494.

1845.
 STEELE
 v.
 HARMER.

and that *he* indorsed it to the plaintiff. Then the pleas allege, that, after the acceptance and *before* it was so indorsed to the plaintiff, Wood waived the acceptance, &c. Therefore the alleged waiver was before any person had acquired a title by transfer from the payee. [*Parke, B.*—The allegation in the declaration might be proved by Wood's indorsing in blank, and the bill's passing through ten different hands: the indorsement *to the plaintiff* is not complete until it is in his hands. Wood may have parted with the bill long before.] He indorses as soon as he puts his name on the back of it. [*Parke, B.*—But the plea does not say that the waiver by him was before he put his name on the back, but before the indorsement to the plaintiff, *i. e.* before the plaintiff had a title by indorsement. It is quite clear this is a good objection to the pleas.]

Secondly, as to the construction of the statute. It authorizes the company, by ss. 6—8, to make a cemetery, and build chapels and other works therein. Then the 46th section, for these purposes, gives the directors certain specific powers, which are followed by a general authority to make “contracts and bargains touching the said undertaking.” Now it is admitted that the debt in respect of which this bill was given was a “contract or bargain” within the act. Then, suppose it had contained a stipulation for payment at a specified future day, would it not have been good? Now a bill of exchange is only a *contract* of that description. And here it is clear that the word “contract” means something beyond an ordinary simple contract relating to the construction of the works, for sect. 47 uses the words “contract *or instrument*.” Then the pleas state that this bill was accepted by the defendants as directors, pursuant to the act, on behalf of the company, and for and on account of a debt due from the company to Wood, which had been contracted by the company under the powers of the act; of all which the plaintiff had notice. With respect to the case of *Dickinson v. Valpy*, it is no doubt true that such a company cannot

borrow money on bills; but that is not the question here. [Parke, B.—Surely the act never intended that they should negotiate bills. The word “instrument,” in section 47, may apply to something which does not amount to a contract, as a power of attorney to enter upon lands.] There seems no reason why so narrow a construction should be put upon it; but, at all events, the word “contract” will include a contract by bill of exchange. [Parke, B.—But then we must look to the whole purview of the act. It is quite foreign to the purposes of such a company to give bills of exchange. Looking at the whole act, it seems quite clear that the legislature never intended to give a power to negotiate bills: it is wholly unnecessary to the constitution of the company. Therefore, if the directors choose to accept a bill, it is their own affair.]

Lastly, the tenth and following pleas afforded a good answer to the action. They amount to this, that, before breach, one of the joint contractors paid the value of the contract. In *Richards v. Richards*, the remedy was only suspended; the right of action continued in the wife, until reduced into possession by the husband. *Freakley v. Fox* (a) is an authority for the defendants. It was there held, that, where the payee and holder of a promissory note appoints the maker his executor, the debt is thereby discharged, and no action can be maintained upon the note, even by a person to whom the executor has indorsed it. In *Wankford v. Wankford* (b), and *Cheetham v. Ward* (c), there cited, the appointment by the obligee of a bond of the obligor as his executor, was in like manner held to be a discharge or release of the debt. [Rolfe, B.—In *Freakley v. Fox*, the debt was due upon the note when the maker obtained possession of it as executor. Parke, B.—This is a purchase of the bill by Harmer before it is due.] Suppose it an accommodation bill, and that all

1845.
STEEL
v.
HARMER.

(a) 9 B. & C. 130; 4 Man. & Ry. 18.

(b) 1 Salk. 299.

(c) 1 Bos. & P. 630.

1845.
 STEELE
 v.
 HARMER.

the three co-makers discounted it before it became due, could they afterwards have re-issued it? No, for it is thereby satisfied as to them. Then the discounting by Harmer is the same as by all the three. The question is not, whether it is *payment* of the bill, properly so called, but whether afterwards they can re-negotiate it. This is in truth a discharge or waiver of the performance of the contract before breach, and is no more than an expanded statement of the defence contained in the fourth and fifth special pleas of the waiver by the payee. It is like the case of *King v. Gillett (a)*, where a plea to a declaration in assumpsit, founded on mutual promises to marry within a reasonable time, that after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof, was held good. [*Parke, B.*—Your plea would be bad, unless it admits that a *prima facie* title passed from Harmer to the plaintiff. We must therefore assume Harmer to have acquired the property in the bill by payment or purchase, and afterwards transferred it to the plaintiff by indorsement, as a trustee for him. If so, is there any objection to that trustee suing? In *Freakley v. Fox*, the bill was *paid* as much as it could be, because it was payable on demand, and therefore came into the hands of the defendant as executor after it was due.] Then the twelfth plea, at all events, raises the same defence, because it alleges that the indorsement by Harmer to the plaintiff was after the bill became due, and therefore that Harmer held it till after its maturity. It was *then* satisfied, and so the case is within *Freakley v. Fox*: he cannot demand payment of himself, and therefore he pays it by the mere fact of his holding it until it is due. He cannot then elect whether that shall operate as payment or not.

Martin, in reply, was desired by the Court to confine

(a) 7 M & W. 55.

himself to the question on the twelfth plea. That plea really amounts to no more than the others. In *Freakley v. Fox*, the debtor was appointed the executor of the creditor; that is an utter extinction of the debt, like a release under seal, not merely of the legal remedy for the debt: Williams on Executors, 1035. But the debt of the acceptor of a bill of exchange is a debt transferable by the delivery of the bill, until actual payment or extinguishment of the debt. [Parke, B.—The difficulty is, how it could have been paid more; because, when it became due, Harmer was himself both creditor and debtor for the whole amount.] The plea is not founded on the defence of *payment*, and the Court will not infer the fact.

1845.
STEELE
v.
HARMER.

PARKE, B.—We have already intimated the grounds upon which we consider that all the pleas are bad except the last three: as to those pleas, we will take a few days to consider.

Cur. adv. vult.

PARKE, B., now delivered judgment.—This was an action upon a bill of exchange accepted by Harmer and the other defendants, and there were several pleas. The Court have already given their opinion that the fourth, fifth, seventh, eighth, and ninth pleas were bad, for the reasons which were assigned at the time of the argument; but the Court reserved its opinion upon the tenth, eleventh, and twelfth pleas.

The tenth and eleventh pleas in substance state, that Wood, who was the payee of the bill accepted by Harmer and the other defendants, indorsed over the bill to Harmer; that Harmer paid a valuable consideration for it, and afterwards it was indorsed over to the plaintiff, without value in the one plea, with notice in the other. Upon those pleas the Court have already intimated a strong opinion, that, in point of substance, they are no answer to the action; but

1845.

STELLE
v.
HARMER.

it is unnecessary to give a final and conclusive opinion on the point. There is some doubt about the effect of the twelfth plea, which states that the bill, when due, was in the hands of Harmer, as indorsee of Wood, being himself one of the persons liable to pay as acceptor, and therefore, it was argued, it could not be afterwards transferred. As to that point, the Court feel a very considerable doubt; but it is unnecessary to give any opinion upon it, because there is one objection pointed out by the special demurrer, common to all the three last pleas, which is, that they are an argumentative traverse of the indorsement, and do not confess and avoid it. Now these three pleas all of them state, that, after the making and accepting of the bill, and before it became due, the same was delivered, so accepted by the defendants, to Wood, who was the payee; and that, after the bill was so accepted and delivered as aforesaid, and while Wood was holder and payee, then that, before the bill became due, Wood indorsed the bill to Harmer. It does not say that he indorsed the bill in blank, so that it could be afterwards transferred to any body, but simply that he indorsed it to Harmer; and then the plea goes on to state, that he did so with the intention to divest himself of all title to the bill, and that Harmer afterwards delivered the bill to the plaintiff. There is no admission of any title in the plaintiff, unless the bill was previously indorsed in blank; and therefore it is only an admission that the plaintiff was owner of the bill by delivery, and not by indorsement; and consequently, the plea, strictly construed (and it must be strictly construed against the defendants), amounts, not to a confession and avoidance, but to an argumentative denial of the indorsement. That objection, being pointed out by the special demurrer, must prevail; and we hold, upon this ground, that all these pleas are bad. The pleas ought to have concluded with a traverse of the indorsement, or should have confessed and avoided, by stating that the bill was indorsed to Harmer in blank, so that he by simple delivery could transfer it to the plaintiff,

and so that the plaintiff might then allege the bill to have been indorsed by Wood to him. This objection to the three last pleas is fatal, and it becomes unnecessary, therefore, to give any opinion whether the twelfth plea is in substance good or not.

Judgment for the plaintiff.

1845.
STEELE
v.
HARMER.

DIETRICHSEN v. GIUBILEI.

Dec. 4.

ASSUMPSIT.—The first count of the declaration stated, that whereas the defendant had become and was tenant to the plaintiff of certain rooms, *on the terms* that the defendant should not allow any nails to be driven into the walls, and that if any damage should arise from so doing, the defendant should pay the costs of repairing the same on vacating the apartments; and that, in consideration thereof, the defendant then promised the plaintiff to use the rooms in a tenantlike manner, and not to allow any nails to be driven as aforesaid; and that if any damage should arise therefrom, the defendant would pay the costs of repairing

Declaration in assumpsit stated, that the defendant had become and was tenant to the plaintiff of certain rooms, *on the terms* that the defendant should not allow any nails to be driven into the walls, and that if any damage should arise from so doing, he would pay the costs of repairing the same on

vacating the apartments; and that, in consideration thereof, the defendant promised the plaintiff to use the rooms in a tenantlike manner, and not to allow any nails to be driven into the walls, &c. &c. The declaration then averred, that the defendant quitted possession of the rooms, and alleged as a breach, that he did not use the rooms in a tenantlike manner, but, on the contrary thereof, pulled down bells and broke chimney-pieces and stoves, and drove nails into the walls; and although the costs of repairing the injuries of the walls amounted to £150, he had not paid that sum, or any part thereof, to the plaintiff:—*Held*, on general demurrer, that this declaration shewed a sufficient consideration for the defendant's promise, by alleging that he had become tenant on the terms of the special agreement, and that it was not necessary to allege that he became tenant to the plaintiff at his the plaintiff's request. Secondly, that the breach was sufficient, although it was not alleged that the bells, stoves, &c., were the property of the plaintiff. Thirdly, that there was no variance between the promise and the breach, by reason of the promise being that the defendant should pay the costs of the repairs generally, and the breach that he did not pay them to the plaintiff.

A plea to this count stated, that, after the making of the promise, so far as related to the driving of the nails, the defendant paid the costs of repairing the injuries occasioned thereby:—*Held* bad, as answering only a part of the count.

Another count of the declaration was framed upon a promise, that, in consideration of the plaintiff permitting a brass plate to be fixed on the outer door of the house, the defendant would cause a new outer door to be made and fixed up in the entrance of the house on the expiration of the tenancy. To this count the defendant pleaded, that he was ready and willing, and tendered and offered to the plaintiff to cause a new door to be made, &c., which offer the plaintiff refused to accept, and prevented the defendant from causing it to be made and fixed up, and refused to allow him to enter into the house for that purpose: and the plaintiff wholly declined and disavowed, and discharged the defendant from carrying the said agreement and promise into effect:—*Held* bad for duplicity.

1845.
Dietrichsen
v.
Giubilei.

all injuries occasioned thereby. The declaration then averred, that the defendant quitted possession of the said rooms, and alleged as a breach, that he did not use the said rooms in a tenant-like manner, but, on the contrary thereof, pulled down divers bells, and broke and destroyed divers chimney-pieces and stoves, and drove nails into the walls; and although the costs of repairing the injuries of, and thereby occasioned to, the walls amounted to a large sum of money, to wit, £150, yet the defendant had not paid the said sum of £150, or any part thereof, to the plaintiff.

The second count stated, that, in consideration of the plaintiff permitting a certain brass plate to be fixed to the outer door of the house, and to remain there during the tenancy, the defendant promised the plaintiff to cause a new outer door to be made and fixed up in the entrance of the dwelling-house at the expiration of the tenancy; that although the brass plate was fixed, and remained upon the door during the tenancy, yet the defendant did not nor would at any time cause a new door to be made and fixed up in the said dwelling-house.

Plea to the first count: "And for a further plea in this behalf to the said first count, the defendant says, that, after the making of the promise in the said first count mentioned, so far as relates to the driving of the said nails in that count mentioned, he the defendant paid the costs of repairing the injuries occasioned by the driving of the nails," &c., concluding to the country.

Plea to the second count: "That, before the commencement of this suit, to wit, on &c., the defendant was ready and willing, and then tendered and offered to the plaintiff, to cause a new door to be made and fixed up in the entrance of the said messuage or dwelling-house, to accept which said offer the plaintiff did then wholly refuse, and did then wholly forbid and prevent the defendant from causing the said door to be so made and fixed up as aforesaid, and hath since and doth still wholly refuse to allow the defendant to enter into and upon the said messuage

or dwelling-house for the purpose of causing the said door to be so made and fixed up as aforesaid. And the plaintiff, to wit, on &c., wholly declined and disavowed, and discharged the defendant from the carrying the said agreement and promise in the said second count mentioned into execution, for which reason, and no other, the defendant did not, upon or before the expiration of the said tenancy, nor hath he at any time since, hitherto caused such new door to be made and fixed up in the said entrance of the said messuage or dwelling-house, according to the tenor and effect, true intent and meaning, of his promise in that behalf."—Verification.

1845.
DIETRICHSEN
v.
GIUBILEI.

Special demurrer to the plea to the first count, assigning for cause, that it professes to answer the whole of the first count, but in fact answers a part only, namely, that which relates to the driving the nails into the walls.

Special demurrer to the plea to the second count, assigning for cause, that the plea is multifarious and double, in this, that it first alleges that the plaintiff prevented the defendant from performing the agreement; and secondly, that the plaintiff discharged the defendant from the performance of it.

Joinder in demurrer.

Bovill, in support of the demurrers.—The third plea is bad in form. It professes to answer the whole of the first count, whereas in fact it is an answer only to that part which relates to the driving of the nails into the wall. That is a fatal defect: *Putney v. Swann* (a), *Hughes v. Pool* (b), *Barratt v. Goddard* (c).

The sixth plea is also bad, as containing two distinct answers to the second count of the declaration: first, that the defendant was ready and willing, and tendered and offered to plaintiff, to cause the new door to be made, which the plaintiff prevented him from doing; and secondly,

(a) 2 M. & W. 72.

N. R., 959.

(b) 6 Man. & G. 271; 6 Scott, (c) 1 Dowl. P. C., N. S., 874.

1845.
 DITTRICHSEN
 v.
 GIUBILEI.

that the plaintiff discharged the defendant from the carrying of his agreement and promise into execution. The latter would of itself have been an answer: *King v. Gillett (a)*.

Ball, contra.—The third plea is in substance an answer to the whole of the first count; for the residue of the count, which is not expressly answered, relates to the pulling down of the bells, and destroying the chimney-pieces and stoves; and it is not alleged that those articles were the property of the plaintiff. The plaintiff is not entitled to damages in respect of goods which are not alleged to be his property: *Pritchard v. Long (b)*. But, further, this destruction of the property is mere matter of aggravation, and so not traversable. [*Parke, B.*—The breach is, that the defendant did not use the premises in a tenant-like manner, but, on the contrary thereof, pulled down divers bells, and broke and destroyed chimney-pieces and stoves, and drove nails into the walls. That is quite a sufficient averment; it does not signify to whom they belonged.]

But the first count of the declaration is defective in substance, by reason of a variance between the promise and the breach. The promise is, generally, that the defendant will pay the costs of the repairs; whereas the breach is, that he did not pay the costs of the repairs *to the plaintiff*. It is consistent with the promise, as alleged, that the defendant may have been bound to pay the costs of the repairs directly to the persons who did the work. The breach ought to be assigned in the words of the contract, or in words which are co-extensive with it in import and effect: 1 Chitty on Pleading, 341, (7th edit). Further, there is no direct allegation that the walls have been repaired at all. Again, the declaration is defective, in not averring that the defendant became tenant *at the request* of the plaintiff. Many cases exist where a man

(a) 7 M. & W. 55.

(b) 9 M. & W. 666; 1 Dowl., N. S., 883.

may be tenant, without being liable as stated in this declaration. It may be that the plaintiff was assignee of the reversion, and that no new contract of tenancy had been created between him and the defendant. On this point he referred to *Chownes v. Brown* (a).

1845.
DIETRICHSEN
v.
GIUBILEI.

Lastly, the sixth plea is a good answer to the second count. It is framed according to the precedent in Chitty's Pleading, vol. 3, p. 198, (7th edit.)

Bovill, in reply.—The declaration is good. It shews a good consideration for the defendant's promise, by alleging that he had become and was tenant on the terms of the special agreement, and it was unnecessary to state that he became tenant at the plaintiff's request. [*Parke*, B.—Would the averment, that the defendant had become and was tenant, be supported by proof that the plaintiff was assignee of the reversion? Can the assignee of any reversion on a parol lease take advantage of the agreement, and bring an action of assumpsit against the tenant?] There the party does not become tenant, unless a new tenancy be created between the parties; but here the declaration states that the defendant had become and was tenant *on the terms of the agreement*, and he is, therefore, bound to perform them: *Richardson v. Gifford* (b). [*Parke*, B., referred to *Brown v. Crump* (c)]. There it was sought to engraft a special contract on the mere relation of landlord and tenant. *Granger v. Collins* (d) is to the same effect.

PARKE, B.—On consideration, I think that the declaration is sufficient, at all events on general demurrer. With respect to the objection, that there is no allegation that the defendant became tenant to the plaintiff at the request of the plaintiff, I think such an allegation was not necessary in this case; for, under a traverse of the

(a) 14 Law J., N. S., Exch., 216.

(c) 1 Marsh. 567.

(b) 1 Ad. & Ell. 52.

(d) 6 M. & W. 458.

1845.
 DIETRICHSEN
 v.
 GIURILEI.

averment that the defendant became tenant on the terms alleged in the declaration, the plaintiff would be bound to prove that the defendant entered into the agreement therein stated. The case is distinguishable from those in which nothing is stated as the consideration for the promises, besides the mere relation of landlord and tenant. That relation, in strictness, only creates an obligation not to commit waste. Thus, in *Brown v. Crump*, where the declaration stated, that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend £60 worth of manure thereon every year, the Court of Common Pleas held the declaration bad on general demurrer. But here it is stated that the defendant became tenant on the terms that he should not drive nails into the walls, and that he should use the premises in a tenant-like manner; and that imports the allegation that there was an original contract between the parties to that effect.

With respect to the pleas, the plea to the first count is clearly bad, for it is pleaded to the whole count, and answers but a part of it. The other plea is also bad for duplicity; it attempts to set up a double answer. Besides, there is no offer to perform the contract at the time when the defendant was bound to perform it, namely, at the end of the term; it is consistent with every allegation in the plea that the offer was made at the beginning of the term. Then the breach alleged in the first count is sufficient, for it must be inferred that the chimney-pieces, and other articles said to have been damaged, were fixtures, and so belonged to the plaintiff. The second breach is also well assigned, because the contract between the parties is not that the defendant should repair the damage done by driving the nails into the walls, but that he should pay the costs of the repairs; which must mean that he is to pay the costs to the landlord, who is to employ the workmen to do the repairs.

The defendant may amend on payment of costs, otherwise there must be judgment for the plaintiff.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Leave to amend on payment of costs ; otherwise

Judgment for the plaintiff.

1845.
DIETRICHSEN
v.
GIUBILEI.

YORSTON v. FETHER.

Dec. 5.

DEBT for goods sold and delivered, money lent, &c.

Plea, that, after the making of the contracts, and after the accruing of the causes of action in the declaration mentioned, and *before the commencement of the suit*, to wit, on &c., the plaintiff had petitioned the Court for the Relief of Insolvent Debtors, under the 1 & 2 Vict. c. 110; and that the usual vesting order had been made by that Court on the day and year aforesaid, to vest in the provisional assignee of insolvent debtors in England all the real and personal estate and effects of the plaintiff, &c., and all the future right, title, interest, and trust of the plaintiff to any real or personal estate, &c., which the plaintiff might purchase, or which might revert, descend, be devised or bequeathed to him, before he should become entitled to his final discharge in pursuance of the said act, according to the adjudication made in that behalf; or, in case the plaintiff should obtain his full discharge from custody without any adjudication being made by the said Court, then before the plaintiff should be so fully discharged from custody, and all debts due or growing due to the plaintiff, or to be due to him before such discharge as aforesaid; by virtue of which order, and of the statute, the debts and

In an action of debt for goods sold, money lent, &c., the defendant pleaded, that, after the accruing of the cause of action and before the commencement of the suit, the plaintiff had petitioned the Court for the Relief of Insolvent Debtors, under 1 & 2 Vict. c. 110, and that, by virtue of an order of that Court, all his rights and property had, before the commencement of the suit, become vested in the provisional assignee. Replication, that, after the vesting order was made, the plaintiff's petition was dismissed by the said Court, and he was dis-

charged from custody without taking the benefit of the act:—*Held*, that the replication was bad, inasmuch as the dismissal of the petition must be taken to have been since the action was commenced, and could not give any title to sue, when none existed at the time the action was brought.

1845.
 YORSTON
 v.
 FETHER.

sums of money in the declaration mentioned, then and *before the commencement of this suit*, became and were vested in the said provisional assignee; which said vesting order still remains in full force and effect, &c.

Replication, that, after the making of the vesting order in the plea mentioned, to wit, on the 30th of June, 1845, it was duly ordered by the said Court for the Relief of Insolvent Debtors, that the said petition of the plaintiff in the plea mentioned should be dismissed, the plaintiff having been discharged from custody without taking the benefit of the said act, and the said petition was thereby then dismissed by the said Court; and that the said provisional assignee had not received, nor the defendant paid to him, the debt and monies in the declaration mentioned and demanded, or any of them, or any part thereof, &c.

Special demurrer, and joinder in demurrer.

Willes, in support of the demurrer.—The replication is bad, for it is consistent with it that the order of the Court of Insolvent Debtors for the dismissal of the petition was made after plea pleaded, as, since the new rules, facts alleged in pleading cannot be taken to have existed until just before the time of plea pleaded: *Tucker v. Webster* (a), *Allen v. Hopkins* (b). The plaintiff is therefore not entitled to recover, for he must have had a cause of action at the time of the suing out of the writ: Com. Dig. "Action," (E.)

F. V. Lee, contra.—The question in this case turns on the construction of the 37th section of the 1 & 2 Vict. c. 110, which enacts, that, "upon filing his petition by a prisoner, or the filing of such petition by his creditor, and the evidence in support thereof, as the case may be, it shall be lawful for the Court for the Relief of Insolvent Debtors, and such Court is hereby authorised and required, to order that all the

(a) 10 M. & W. 371.

(b) 13 M. & W. 94.

real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of £20, and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects, within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall become entitled to his final discharge in pursuance of this act, according to the adjudication made in that behalf, or, in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said Court, then before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, and such order shall be entered of record in the same court, and such notice thereof shall be published as the said court shall direct; and such order, when so made, shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee: Provided always, that, *in case the petition of any such prisoner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall, from and after such dismissal, be null and void to all intents and purposes*; Provided also, that, in case any such vesting order as aforesaid shall become null and void by the dismissal of the prisoner's petition, all the acts theretofore done by the said provisional assignee, or any person or persons acting

1845.
 YORSTON
 v.
 FETTER.

1845.
 YORSTON
 v.
 FETHER.

under his authority, according to the provisions of this act, shall be good and valid." By that section, a vesting order obtained by an *insolvent* is rendered null and void to all intents and purposes; and, as a consequence of the dismissal of the petition, all parties must be remitted to the rights which they had prior to the vesting order being made. The intermediate acts of the provisional assignee are protected by the subsequent words of that section.

PARKE, B.—Independently of the proviso in the 37th section of this act, it is quite plain the plaintiff could have no right to maintain this action. Then, does that proviso give him the right? We must take it, that at the time the plaintiff commenced this suit he had no cause of action, and that in the interval between that time and the dismissal of the petition, the defendant had a good answer to the plaintiff's claim; and if the statute gives him a title to maintain the action now, he having had none when he sued out the writ, it does that which is unknown to the law in any other case. That, however, is not so; the words in the 37th section, "in case the petition of any prisoner shall be dismissed, the vesting order made in pursuance of it shall, from and after such dismissal, be null and void to all intents and purposes," can only mean that it shall be null and void from the time it is declared so by the Insolvent Debtors Court. In the case of an administration, a man cannot sue out a writ as administrator, until he has obtained his letters of administration, although, when he has obtained them, all tortious acts done to the deceased's property relate back to the time of his death, so as to enable the administrator to sue for them. Our judgment must be for the defendant.

ALDERSON, B.—The defendant had a good defence when the action was brought and at the time the plea was

pleaded. How can an act done by others subsequently take away that defence? The act may be used as a shield, but not as a sword.

1845.
YORSTON
v.
FETHER.

ROLFE, B., and PLATT, B., concurred.

Judgment for the defendant.

SUTCLIFFE v. BROOKE (a).

THIS was an action of debt brought by the plaintiff, as assignee of one Jonas Ingram, who had been discharged as an insolvent debtor under the statute 1 & 2 Vict. c. 110. The declaration stated, that an action by the now plaintiff, as such assignee, had been brought to recover £1000, due to the insolvent; that, after issue joined, all matters in difference in the action and between the parties were, by a judge's order and consent, referred to arbitration, so as the arbitrator should make his award on or before the 1st of November then next. The declaration then alleged, that "thereupon, *in consideration of the plaintiff then agreeing*, at the request of the defendant, *to abide by, perform, and fulfil the award*, so to be made as aforesaid on his the plaintiff's behalf, the *defendant then agreed* with the plaintiff to abide by, perform, and fulfil the same on his the defendant's behalf;" that the arbitrator afterwards made his award, and did thereby find that the plaintiff, as such assignee, was entitled to recover from the defendant the sum of 372*l.* 3*s.*, which sum he then ordered to be paid by the defendant to the plain-

Debt.—The declaration stated, that an action had been brought by the plaintiff, as assignee of an insolvent, to recover £1000 due to the insolvent; that all matters in difference in the action and between the parties were referred to arbitration, and thereupon, *in consideration of the plaintiff then agreeing to perform the award* on his behalf, the defendant agreed to perform the award on his behalf; that the arbitrator awarded that the plaintiff was entitled to recover from the defendant the sum of

372*l.* 3*s.*, and stated, that, in finding that sum to be due to the plaintiff, he had allowed for all and singular the sums which were ever paid to the insolvent before he became such insolvent. The declaration then averred that the defendant had not paid the sum awarded:—*Held*, that the averment of mutual promises made it an action of debt on a promise to perform the award when made, and not an action of debt on the award itself; and that the declaration was therefore bad.

(a) This case was decided in Michaelmas Term (Nov. 19).

1845.
 SUTCLIFFE
 v.
 BROOKE.

tiff. And the said arbitrator thereby declared, that, in finding the said sum of 372*l.* 3*s.* to be due to the plaintiff, he had allowed to the defendant, and given credit to him for, all and singular the sum and sums which were ever paid by the defendant to Jonas Ingram, before he became such insolvent debtor. The arbitrator also ordered the defendant to pay the costs of the reference and award. The declaration then alleged, that the costs of the plaintiff were taxed at 280*l.* 15*s.*, of which the defendant had notice, and was afterwards requested to pay the sums of 372*l.* 3*s.* and 280*l.* 15*s.*, which he refused to do.

Special demurrer and joinder in demurrer.—

Atherton, in support of the demurrer.—First, this is not an action of debt upon the award, but on mutual promises to abide by the award, which necessarily refers to a time prior to the award; and an action of debt under such circumstances is quite without precedent: no such form of action is to be found. In *Watson on Awards*, p. 281, it is said, "There are three forms of remedy for enforcing the payment of money due on an award: 1st, an action of debt on the bond given for the performance of the award; 2ndly, an action of debt on the award itself; and, 3rdly, an action of covenant or assumpsit on mutual promises to abide by an award." That doctrine is supported by the precedents:—*Hansard's Entries*, 13, 89; *Rastall's Entries*, 153, 156; *Liber Placitandi*, 19, 107, 116; 1 *Wentw. Plead.* 90, 100; 2 *Chit. Plead.*, "Debt on Awards," 298; *Hodsdon v. Harridge* (a); *Brownlow's Entries*, 41, 80; and *Coke's Entries*, 3. The current of authorities is unvarying, from the cumbrous *Rastall* to the more concise *Watson*. An action of debt on mutual promises to perform an award is contrary to all principle. It is maintainable on a contract by parol, only where that contract is to pay a sum

(a) 2 Saund. 61 h.

certain: Bac. Abr. "Debt," A., pl. 1; Com. Dig. "Debt," (A.) 1. The opinion expressed by Lord *Loughborough* in *Rudder v. Price* (a) shews the cogency of precedents in determining questions of this kind. It was there held, that debt would not lie for instalments due on a promissory note; and his lordship says, "I cannot, indeed, devise a substantial reason why a promise to pay money not performed does not become a debt, and why it should not be recoverable, eo nomine, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of assumpsit, no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and, being so considered, no action of debt can be maintained upon it till all the days of payment are passed." In this case, the promise alleged necessarily refers to some time prior to the award; and the contract is to abide by the award, and not to pay a sum of money certain. It is not an action on the award at all. Besides, the arbitrator may have ordered the performance of some collateral act: as to build a wall, the breach of which sounds in damages: Com. Dig. "Arbitrament," (I.) 2. It may perhaps be said, that this is debt on the award, and the statement of mutual promises is superfluous; but at all events it is uncertain whether this is an action of debt upon the award, or on the submission to arbitration, and that is pointed out as a cause of special demurrer. Secondly, as this is a submission to arbitration of the affairs of an insolvent, it ought to have been averred, pursuant to 1 & 2 Vict. c. 110, s. 51, that the submission was with the consent of the major part in value of the creditors.

Cowling, contra.—As to the objection that no authority to refer is shewn in the declaration, the answer is, that

(a) 1 H. Bl. 555.

1845.
 SUTCLIFFE
 v.
 BROOKE.

the defendant, by entering into the reference, is estopped from saying that the plaintiff had no authority to refer: *In re Warner (a)*. Besides, the 51st section of 1 & 2 Vict. c. 110, resembles in its terms the 24th section of the former Insolvent Act, 7 Geo. 4, c. 57, which has been held to be directory only. [*Pollock*, C. B.—It is here not necessary to say that the clause is directory only. The true answer to the objection is, that, although the assignee may be responsible to the creditors for referring without authority, still he is equally responsible to the other party to the suit, in respect of his agreement to refer.]

Then as to the principal point. It is admitted that this is an action of debt founded on the submission, but it is coupled with an award, and where it is so debt is maintainable: 2 Chitty on Pleading, 298, 65, last edition. The action is really founded on the submission under the judge's order, and the insertion of mutual promises is merely superfluous, and makes no difference. When an arbitrator awards that a party shall pay a sum of money, debt lies; so, if there be an agreement to pay a sum of money, and the arbitrator afterwards award it, surely debt is maintainable.

POLLOCK, C. B.—I think this is a vicious declaration. The introduction of the averment of mutual promises makes it an action of debt to perform an award when made, and not an action of debt on the award itself. The plaintiff had better amend.

ALDERSON, B., and ROLFE, B., concurred.

Judgment accordingly.

(a) 2 Dowl. & L. 148.

1845.

Earl of Rosse *v.* WAINMAN.

Dec. 5.

TROVER, charging the defendant with the conversion of fossils, stones, flagstones, and other minerals, to which the defendant pleaded not guilty, and a denial of the plaintiff's property.

Issue having been joined, a case was stated by consent of the parties for the opinion of this Court, as follows:—

For many years previous to and at the time of the passing of the act of Parliament hereinafter next mentioned, the Reverend Cyril Jackson, D.D., was seised in fee of the manor of Shipley, in the county of York.

By an act of Parliament passed in the 55th year of the reign of his late Majesty King George the Third, intituled “An Act for inclosing Lands within the Manor and Township of Shipley, in the Parish of Bradford, in the West Riding of the county of York,” after reciting, that there were, within the manor and township of Shipley, in the parish of Bradford, in the West Riding of the county of York, several commons or parcels of waste ground called

Certain waste lands in the manor of Shipley, to the soil of which, and everything constituting the soil, the lord of the manor was entitled, were, by an Inclosure Act, 55 Geo. 3, c. xviii, (which recited the lord's title), taken away from the lord and allotted to commoners, except as saved by the 32nd clause. That clause reserved to the lord all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as

full, ample, and beneficial a manner, to all intents and purposes, as he could or might have held and enjoyed the same in case the said act had not been made; and enacted, that he should and might at all times thereafter have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, with full liberty of digging, sinking, searching for, winning, and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron-stone and fossils, to be gotten thereout: provided that the lord, in the searching for and working the said mines and minerals, should keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata. The 33rd section provided for reimbursement to the owners of allotments, for injury done by searching for or working the mines and minerals:—*Held*, that the reservation clause must be construed with reference to the title of the lord to the whole of the soil; and, inasmuch as the object of the act was to give to the commoners the surface for cultivation, and leave in the lord what it did not take away for that purpose, the word “minerals” must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; and this notwithstanding the provision in the latter part of the clause, authorising the carrying away the “lead ore, lead, coal, iron-stone, and fossils,” as fossils may apply to stones dug in quarries: therefore, that the clause reserved to the lord the right to the stratum of stone in the inclosed lands.

1845.
Earl of Rosse
v.
WAINMAN.

High Bank and Low Moor, and several other parcels of waste ground, containing in the whole, by estimation, 280 acres, or thereabouts; and also reciting, that the Reverend Cyril Jackson, D.D., was lord of the manor of Shipley, and as such was owner of the soil of the said commons and waste grounds, and entitled to all mines and minerals within and under the said commons and waste grounds; and reciting, that the said Cyril Jackson, and several other persons, were owners and proprietors of estates within the manor and township of Shipley aforesaid, and in respect thereof were entitled to right of common and other rights and interests in and upon the said commons and waste grounds; it was (amongst other things) enacted, that the commissioner appointed for carrying the said act into execution should, after setting out and appointing the public carriage roads and highways through and over the said commons and waste grounds intended to be divided, allotted, and inclosed as aforesaid, set out, allot, and award unto and for the said Cyril Jackson, as lord of the said manor, and to such person or persons as should then be entitled to the said manor, his, her, or their heirs and assigns, such part and parcel of the residue and remainder of the said commons and waste grounds as should, in the judgment of the said commissioner, be equal in value to one full sixteenth part of the said residue of the said commons and waste grounds, in lieu of, and as a full recompense for, all such right and interest in and to the soil of the said commons and waste grounds as was not thereafter expressly saved and reserved.

And it was further enacted, that the said commissioner should, in the next place, set out such part or parts of the said commons and waste grounds as he should think proper, not exceeding two acres in the whole, to be used and enjoyed by the respective proprietors of land within the said manor and township of Shipley for the purposes of com-

mon watering-places for cattle, and getting stones and other minerals for erecting and repairing buildings, bridges, walls, fences, and other works, and for the reparation of public and private roads within the said manor and township.

1845.
 Earl of Ross
 v.
 WAINMAN.

And it was further enacted, that the said commissioner for the time being should set out, assign, and allot the residue of the said commons and waste grounds unto and amongst the said Cyril Jackson and the said several other persons entitled to right of common or other rights and interests in and upon the said commons and waste grounds, their respective heirs, executors, administrators, and assigns, according to the value of the messuages, cottages, mills, old inclosed lands, tenements, and hereditaments in respect whereof they were so respectively entitled to such right of common as aforesaid, and according to the value of such other rights or interests as aforesaid.

And it was thereby further provided and enacted, that nothing therein contained should extend or be construed to extend to defeat, lessen, or prejudice the right, title, or interest of the said Cyril Jackson, or any future lord or lords, lady or ladies of the manor of Shipley aforesaid, in or to the seigniories and royalties incident or belonging to the said manor of Shipley, but that the said Cyril Jackson, and such other person or persons as aforesaid, should and might from time to time for ever thereafter hold and enjoy all rents and services, courts, perquisites, and profits of courts, goods and chattels of felons and fugitives, felons of themselves, persons outlawed and put in exigent, deodands, waifs, estrays, forfeitures, and all other jurisdictions whatsoever in and upon the said commons and waste grounds, thereby directed to be divided and inclosed as aforesaid, and all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a

1845.
Earl of Rosse
v.
WAINMAN.

manner, to all intents and purposes, as they could or might respectively have held and enjoyed the same in case the said act had not been made: and that the said Cyril Jackson, and such other person or persons as aforesaid, should and might, from time to time and at all times thereafter, have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof, together with all convenient and necessary ways, and full liberty of laying, making, and repairing waggon ways and other ways in, through, over, and along the said commons and waste grounds, or any part thereof, and with full and free liberty, power, and authority of digging, sinking, searching for, winning, and working the said mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone, and fossils to be gotten thereout, and of making pits, shafts, and pumps, pit-rooms, drifts, levels, and watercourses, and of repairing, amending, and upholding the same, and of erecting, building, and using houses, kilns, fire-engines and other engines, mills, and other erections and buildings, and of altering, changing, pulling, and carrying away the same or all or any of the materials thereof at their free will and pleasure, and to do, execute, and perform all such other works, matters, and things, either then in use or thereafter to be invented, as should or might be necessary or convenient for the full and complete working, use, and enjoyment of the said mines and minerals thereby reserved, in as full, ample, and beneficial a manner, to all intents and purposes, as they might or could have done in case the said act had not been made, without any interruption, disturbance, claim, or demand whatsoever: provided nevertheless, that the said Cyril Jackson, his heirs and assigns, and his and their tenants and lessees, should, and they were thereby required, in the searching for and working the said mines

and minerals, to keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower stratum.

And it was thereby further enacted, that all and every such damage and injury as should or might be occasioned in any allotment or allotments which should be set out under that act, by means of the searching for or working the aforesaid mines and minerals, or any of them, or on account of any works, buildings, or concerns relating thereto, upon or within the said allotments, should be reimbursed to the owner and owners, occupier and occupiers of the same allotments respectively, and should be borne and paid by the several owners of the allotments to be made in pursuance of the said act.

The commissioner appointed by the said act of Parliament, in due manner, on the 30th of May, 1825, made his award, and did thereby, amongst other things, allot and award unto the heirs or devisees of William Wainman, Esq., in lieu of his rights in the commons or waste lands of the manor of Shipley, as owner of certain freehold land within the said manor, four several allotments or inclosures of land.

By indenture of lease and release, dated the 28th and 29th of February, 1820, the said manor of Shipley, with the manorial rights thereto belonging, by the description of all that the manor or lordship of Shipley, with the rights, members, and appurtenances thereof, situate, lying, and being in the parish of Bradford aforesaid, and also all and every the mines and minerals, of what nature or kind soever, lying and being within or under all and every the lands and grounds theretofore divided and inclosed under or by virtue of the said act of Parliament, with all such liberties, privileges, powers, and authorities of digging, sinking, searching for, winning, working, and enjoying, taking and carrying away the said mines and minerals as were reserved, granted, and limited in and by the said act,

1845.
 Earl of Ross
 v.
 WAINMAN.

1845.
Earl of Rosse
v.
WAINMAN.

unto the said Cyril Jackson, or any future lord or lady of the said manor, were, together with a considerable estate in the same township, conveyed and assured by the devisees in trust of the said Cyril Jackson, unto John Wilmer Field, late of Heaton, in the county of York, Esq., deceased, and his heirs and assigns.

The said manor and estate continued vested in the said John William Field down to the year 1837, when he died intestate, leaving two daughters (of whom Mary, Countess of Rosse, the wife of the plaintiff, is one) his co-heiresses-at-law him surviving; and, by virtue of certain settlements since executed, the said manor and estate of Shipley, before the taking of the stone by the defendants's authority, as hereinafter mentioned, became and were, and now are legally vested in the plaintiff, as tenant for life thereof, without impeachment of waste.

Beneath the common lands inclosed under the provisions of the before-mentioned act of Parliament are several valuable beds of coal and iron-stone, and nearer the surface there is also in some places the stone common in the district.

The defendant, before the taking of the stone hereinafter mentioned, became seised of a life estate in the said pieces of land so allotted by the award of the said commissioner to the heirs or devisees of the said William Wainman, as aforesaid, subject to the provisions of the said act.

The defendant, having ascertained that there was some stone fit for building under one of the said allotments to which he is entitled for life as aforesaid, agreed to sell such stone to Messrs. Nathan Atkinson, William Hill, Thomas Hillary, David Hillary, and George Hillary, all of Bradford aforesaid, stone merchants, who forthwith commenced getting it, and by the authority of the defendant, previously to the commencement of this action, raised, severed, took and carried away 296 superficial square yards of the said stone, the same being of the value of 44*l.* 8*s.* The plain-

tiff claimed from the defendant, that, as lord of the said manor, he was entitled to the said stone so found and raised in the said allotment; but the defendant denied that the plaintiff had such right; whereupon the plaintiff caused this action to be brought.

The question for the opinion of the Court is, whether the plaintiff is entitled to the said stone so gotten and raised under the said allotment. If the Court shall be of that opinion, then the parties consent that judgment shall be entered for the plaintiff by confession, for 44*l.* 8*s.* damages; but if the Court shall be of the contrary opinion, then the parties consent that judgment of nolle prosequi shall be entered for the defendant, but with liberty to either party to take the case down to trial, for the purpose of turning it into a special verdict. Copies of the Inclosure Act, and of the award of the commissioner, accompany this case, and form part of it.

The point marked for argument on the part of the plaintiff was, that he contended he was entitled to the stone in question as lord of the manor of Shipley, according to the true construction of the Shipley Inclosure Act, and especially of the reservation therein contained to the lord of all mines and minerals under the several allotments to be set out under the provisions of the act.

The case was argued (Nov. 17 and 19) by

Hugh Hill, for the plaintiff.—The question here depends on the construction to be put on the meaning of the words “mines and minerals, of what nature or kind soever,” contained in the clause of reservation in the 32nd section of the Shipley Inclosure Act. That section enacts, “that nothing herein contained shall extend, or be construed to extend, to defeat, lessen, or prejudice the right, title, or interest of the said Cyril Jackson, or any future lord or lords, lady or ladies of the manor of Shipley aforesaid, in or to the seigniories and royalties incident or belonging to the said manor

1845.
 Earl of Ross
v.
 WAINMAN.

1845.
 Earl of Rosse
 v.
 WAINMAN.

of Shipley, but that the said Cyril Jackson, and such other person or persons as aforesaid, shall and may, from time to time for ever hereafter hold and enjoy all rents, services, courts, perquisites, and profits of courts, goods and chattels of felons and fugitives, felons of themselves, persons outlawed and put in exigent, deodands, waifs, estrays, forfeitures, and all other jurisdictions whatsoever, in and upon the said commons and waste grounds hereby directed to be divided and inclosed as aforesaid, and *all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds*, in as full, ample, and beneficial a manner, to all intents and purposes, as they could or might respectively have held and enjoyed the same, in case this act had not been made; and that the said Cyril Jackson, and such other person or persons as aforesaid, shall and may, from time to time and at all times hereafter, have, hold, win, work, and enjoy exclusively *all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof, together with all convenient and necessary ways, and full liberty of laying, making, and repairing waggon ways and other ways in, through, over, and along the said commons and waste grounds, or any part thereof, and with full and free liberty, power, and authority, of digging, sinking, searching for, winning, and working the said mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone and fossils*, to be gotten thereout, and of making pits, shafts and pumps, pit-rooms, drifts, levels, and watercourses, and of repairing, amending, and upholding the same, and of erecting, building, and using houses, kilns, fire-engines, and other engines, mills, and other erections and buildings, and of altering, changing, pulling down, and carrying away the same, or all or any of the materials thereof, at their free will and pleasure, and to do, execute, and perform all such other works, acts, matters, and things, either now in use

or hereafter to be invented, as shall or may be necessary or convenient for the full and complete working, use, and enjoyment of the said mines and minerals hereby reserved, in as full, ample, and beneficial a manner, to all intents and purposes, as they might or could have done in case this act had not been made, without any interruption, disturbance, claim, or demand whatsoever: provided nevertheless, that the said Cyril Jackson, his heirs and assigns, and his and their tenants and lessees, shall, and they are hereby required, in the searching for and working the said mines and minerals, *to keep the first layer or stratum of earth separate* and apart by itself, without mixing the same with the lower strata." In construing the words "mines and minerals" in that clause, the Court will look to the whole act, and to the circumstances under which and the purposes for which it was made. The act begins by reciting that the lord of the manor of Shipley is the owner of the soil of the commons and waste grounds, and entitled to all mines and minerals under them; and the only object of the legislature, in inclosing these commons, was the cultivation of the soil, and it was not intended to deprive the lord of any thing beyond the surface for that purpose. The concluding part of the 32nd section, which requires the lord and his lessees, in the exercise of the rights reserved to them, to keep separate the first layer or stratum of earth, without mixing the same with the lower strata, shews that it was the surface only that was intended to be taken away from the lord.

This view of the case is supported by the 33rd section, which provides, that all damage occasioned by the working of the mines shall be reimbursed to the owners and occupiers of the allotments. The word "minerals" must be understood to mean, not only metallic substances, but all fossil matter obtained from mines or pits; and in the 32nd clause, the word "fossils" is expressly used, and that would surely include stone. The definition of "mines, minerals,"

1845.
 Earl of ROSS
 v.
 WAINMAN.

1845.
 Earl of Rosse
 v.
 WAINMAN.

&c., in Tomlins' Law Dictionary, is "quarries or places where any thing is digged." Dr. Johnson defines a mine to be "a place or cavern in the earth which contains metals or minerals:" and he defines a mineral to be a "fossile body; matter dug out of mines: all metals are minerals, but all minerals are not metals." He defines stone thus: "Stones are bodies insipid, hard, not ductile or malleable, nor soluble in water." [*Alderson, B.*—The 18th section provides, that the commissioner shall set out such parts of the commons as he shall think fit, not exceeding two acres, to be used and enjoyed by the proprietors of land, for the purposes of common watering-places for cattle, and getting stones and *other minerals* for erecting and repairing buildings, &c., and for the reparation of the public roads.] That shews that the stones would otherwise be vested in the lord, or there would have been no necessity for excepting them out of the act.

Cowling, contra.—Stones are not included within the terms "mines and minerals" in the 32nd section. The object of the act was, that the waste lands should be inclosed: the lord should have the mines only in the strict sense of the word. By the 17th section, the commissioner is to set out such parts of the waste as shall be equal in value to one-sixteenth part of it, as a recompense for all such right and interest as was not thereafter expressly reserved. With respect to the 18th section, the word "minerals" is there clearly used by mistake for *materials*, the only object of that section being to provide materials for erecting and repairing buildings, walls, fences, &c., and the public roads. The stratum of stone in question lies near the surface, and would be known of at the time the act was made, and, therefore, if intended to be reserved, would have been so by the term "stone." A mine is a subterraneous working, and clay, if got low in the earth,

may be called a mine, but not if near the surface: *Rex v. Brettell* (a). A reservation of this stone would be contrary to the spirit of the act, the object of which was to promote the improvement of the land. There is no such reservation in the General Inclosure Act; and the 14th and 10th sections of that act will be found to be at variance with it. This reservation must be construed strictly against the lord: the words are, "mines and minerals 'within and under' the waste." Whether or not a place is a mine, depends on the mode of working it, and it must be subterraneous: *Rex v. Dunsford* (b) and *Rex v. Sedgely* (c). [Parke, B.—Is the lord's right to a mineral to depend on the mode of working it?] A mineral is something which comes out of a mine. All stone is part of the mineral kingdom, and if the lord's construction of this reservation is right, he might take gravel and clay. The word "fossils," in the 32nd section, must be construed with reference to the foregoing words, viz. "lead ore, lead, coal, iron-stone;" it is used as ejusdem generis. In the 18th section *stone* is expressly mentioned, and power given to the proprietors of land to get stone; but that is virtually repealed by the 32nd section, if it be construed as the other side contend it should be. In *Townley v. Gibson* (d), the words "rent, and all other royalties and manorial jurisdictions whatever," were held not to include mines.

1845.
 Earl of Ross
 v.
 WAINMAN.

Hugh Hill, in reply.—The word "stones," being coupled with the words "other minerals," in the 18th section of the act, tends strongly to shew that the framers of the act meant to include them in the latter term; and there can be no question, that the words "mines and minerals" are sufficient to include stone, if the Legislature intended that

(a) 3 B. & Ad. 424.

(b) 2 Ad. & El. 565.

(c) 2 B. & Ad. 65.

(d) 2 T. R. 701.

1845.
 Earl of Rosse
 v.
 WAINMAN.

they should do so. In *Rex v. Sedgely* (a), limestone was held to be a mineral when it was worked by sinking shafts perpendicularly down to the stratum. But what ought to determine this question in favour of the plaintiff is, the clause at the end of the 32nd section, which requires the lord, in the searching for and working the mines, to "*keep the first layer of earth separate and apart*" by itself, without mixing the same with the lower strata, which shews that he was to be entitled to all below the first layer.

Cur. adv. vult.

PARKE, B.—The question in this case is, whether the plaintiff, Lord Rosse, is entitled to the stratum of stone under the allotments of the waste of the manor of Shipley, inclosed by virtue of the act of 55 Geo. 3, c. 18.

Lord Rosse is the assignee of Dr. Cyril Jackson, who was lord at the time of the inclosure, and has all the rights reserved to him by the Inclosure Act.

What these rights are depends upon the construction of the act, which is not very clearly expressed, and is open to much doubt; but the result of our consideration of the whole of its provisions is, that, in our opinion, the right to the stratum of stone was reserved to the lord, and consequently the plaintiff is entitled to recover.

It is clear from the recital, that, before the passing of the act, the lord was entitled to the soil of the waste, and to everything constituting that soil, including every stratum of stone; and the question is, how much of this right is taken away and transferred under the Inclosure Act to those to whom allotments are made?

All is taken away except that which is reserved by the saving clause (the 32nd), which is to be construed with reference to the original title of the lord to the whole of the soil. That section provides, that nothing in the act

(a) 2 B. & Ad. 65.

contained is to be construed to extend to defeat, lessen, or prejudice the right, title, or interest of Cyril Jackson, or any future lord or lords of the manor of Shipley aforesaid, in or to the seigniories and royalties belonging to the said manor of Shipley, but that Dr. Jackson may from time to time enjoy all rents, services, courts, &c., and all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as they could or might respectively have held and enjoyed the same in case this act had not been made." Then it goes on to make a provision for the working of the mines and minerals: "And that the said Cyril Jackson, and such other person or persons as aforesaid, shall and may, from time to time and at all times thereafter, have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof, together with all convenient and necessary ways, and full liberty of laying, working, and repairing waggon ways and other ways in, through, over, and along the said commons and waste grounds, or any part thereof, with full and free liberty, power, and authority of digging, sinking, searching for, winning and working the said mines and minerals, and leading and carrying away the lead ore and coal, iron-stone, and fossils, to be gotten thereout, and of making pits, shafts, and pumps, &c., and of erecting, building, and using houses, kilns, fire-engines, and other engines, &c. at their free will and pleasure, and to do, execute, and perform all such other works, acts, matters, and things, either now in use or thereafter to be invented, as shall or may be necessary or convenient for the full and complete working, use, and enjoyment of the said mines and minerals thereby reserved, in as full, ample, and beneficial a manner, to all intents and purposes, as

1845.
 Earl of Ross
 v.
 WAINMAN.

1845.
 Earl of Rosse
 v.
 WAINMAN.

they might or could have done in case this act had not been made, without any interruption, disturbance, claim, or demand whatsoever: Provided, nevertheless, that the said Cyril Jackson, his heirs and assigns, and his and their tenants and lessees, shall, and they are hereby required, in the searching for and working the said mines and minerals, to keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata."

The term "minerals," here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says, that "all metals are minerals, but all minerals are not metals;" and mines, according to Jacob's Law Dictionary, are "quarries or places where anything is digged;" and in the Year Book, 17th Edw. 3, c. 7, "mineræ de pierre" and "de charbon" are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners, and to leave in the lord what it did not take away for that purpose; and this construction is greatly favoured by the last clause, which provides that the surface soil, "the first *layer* or stratum of earth, is to be kept separate, without mixing with the lower strata;" a provision which clearly indicates that the removal of the surface soil to a great extent may take place, and be subsequently restored, so that the getting strata of stone by quarrying must have been contemplated.

It must, however, be admitted, that the provision authorising the working of mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone, and fossils, leads to the supposition that the legislature intended to reserve metallic minerals only, and creates much doubt about the true construction of the word in this act. But

the word "fossils," in a strict sense, may apply to stones dug or quarried; at any rate, we do not think that this provision so clearly indicates the intention of the legislature to limit the proper meaning of the word, as to call upon us to do so.

We place no reliance on the word "minerals" being connected with stone in the 18th section, and treated as ejusdem generis, as the word is probably introduced by mistake for the word "materials."

We are, therefore, of opinion that the plaintiff is entitled to recover.

Judgment for the plaintiff.

1845.
Earl of Rosse
v.
WAINMAN.

BRADLEY v. BARDSLEY and Another.

Dec. 4.

DEBT by the payee against the makers of a promissory note, made on the 15th of April, 1843, for the payment of 145*l.* 4*s.*, on or before the 15th of April, 1845.

Debt by the payee against the makers of a promissory note, dated the 15th of April, 1843, for the payment of 145*l.* 4*s.*, on or before the 15th of April, 1845. Plea, that, by the said note, at the time of the making, the defendants promised to pay the sum therein mentioned, without specifying any time for the payment; that, after the note was made and issued, and was complete and delivered to the plaintiff, the note was, by the defendants' consent, but without the same being re-stamped, altered by the plaintiff in a material part, by making the same to be payable on or before the 15th of April, 1845, and by the insertion of the words "and to be paid on or before the 15th of April, 1845." Replication, that, before and at the time of making, issuing, completing, and delivering the note to the plaintiff, and before the said alteration was made, it was meant and intended by the plaintiff and the defendants that the note should be payable on or before the 15th of April, 1845, and that the words so inserted in the note should be inserted therein, but by the mistake of the plaintiff and the defendants the note was made and issued, and was complete and delivered to the plaintiff, without specifying any time of payment; that the alteration was made with the intent and purpose of correcting the mistake, and making the note payable, according to the intention of the plaintiff and the defendants, within a reasonable time, and before negotiation. Rejoinder, that, before and at the time of the making, issuing, and completing of the note, and before the alteration, it was not intended by the plaintiff and the defendants that the note should be made payable on or before the 15th of April, 1845.

Held, on special demurrer, first, that the rejoinder was bad, as taking too large a traverse, by putting in issue the meaning of the parties *before* as well as *at* the time of making the note; secondly, that the plea was no answer to the declaration, inasmuch as the Stamp Laws authorise the stamping of certain kinds of notes before the *trial*, and the plea did not shew that this was not one of those cases.

Semble, that the replication was bad, in not shewing that the promissory note was not originally binding upon the parties before the alteration.

VOL. XIV.

L L L

M. W.

1845.
BRADLEY
v.
BARDSLEY.

Plea, that, by the said note, at the time the same was made and signed by the defendants, to wit, on the 15th of April, 1843, the defendants promised to pay the said sum of money therein mentioned, without thereby specifying any time for the payment thereof, and the defendants did not thereby then promise to pay the said sum on or before the said 15th of April, 1845, as in the said first count mentioned, or at or within any other day or time whatsoever; that after the note was made and issued, and was complete and delivered to the plaintiff, and not before, to wit, on the said 15th of April, 1843, the note was, by the consent of them the defendants; *but without the same being re-stamped*, altered by the plaintiff in a certain material part, that is to say, by making and expressing the same to be payable on or before the 15th of April, 1845, and by the insertion in the said note of the words "and to be paid on or before the 15th of April, 1845," which words, before such alteration, were not inserted or contained in the said note.—Verification.

Replication, that, before and at the time of making and issuing, and completing and delivering of the note to the plaintiff, and before the said alteration was made, it was meant and intended by the plaintiff and the defendants that the note should be payable on or before the 15th of April, 1845, and that the said words so inserted in the note should be inserted therein; but by the mistake of the plaintiff and the defendants the note was made and issued, and was complete and delivered to the plaintiff, without thereby specifying any time for the payment of the said sum of money; that the alteration was made with the intent and for the purpose of correcting the said mistake and making the note payable and in form according to the said meaning and intention of the plaintiff and the defendants, and with their consent, and within a reasonable time after the making of the note, and before the same had been negotiated by the plaintiff.—Verification.

Rejoinder, that, *before and at* the time of the making and issuing, and completing and delivering of the note to the plaintiff, and before the said alteration was made, it was not meant or intended by the plaintiff and the defendants that the note should be made payable on or before the said 15th of April, 1845, or that the said words so inserted and added in and to the said note should be inserted or added *modo et formâ*, &c.: concluding to the country.

1845.
BRADLEY
v.
BARDSEY.

Special demurrer, assigning for causes (*inter alia*), that the rejoinder was bad, in putting in issue immaterial matter, by traversing that it was meant or intended, *before* the completing, issuing, and delivering the said note, that it should be made payable as alleged in the replication.—Joinder in demurrer.

Willes, in support of the demurrer.—First, the rejoinder is clearly bad. [*Parke*, B.—Yes; the intention of the parties *before* the making of the note is immaterial: the question is, what was their intention *at* the time of making it?] Then, secondly, the plea is bad. It is not a good plea at common law, and can only be made good by importing into it the Stamp Laws. Two points arise upon this head: first, whether, supposing the acts are pleadable, the defendant has introduced sufficient facts to apply them to this case; secondly, whether the Stamp Acts are pleadable or not. The plea says, that, after the note was issued and was complete, it was, by the defendants' consent, but without the same being re-stamped, altered by the plaintiff in a material part, &c. But it is not specific enough to say "re-stamped;" that is an ambiguous word: it should have said "stamped or marked with the payment of duty." [*Parke*, B.—You are now upon general demurrer.] Yes; but there must be some allegation on which issue can be taken, otherwise the pleading is bad on general demurrer. But after the alteration this note could not be re-stamped.

1845.
 {
 BRADLEY
 v.
 BARDSLEY.

When a stamped paper is once used, it cannot be stamped again. [*Parke*, B.—Reject the words “without the same being re-stamped” as unnecessary: what do you say to it then?] Secondly, supposing those words to mean “marked with the payment of duty;” the Stamp Acts are not pleadable, unless in cases where they make the unstamped instrument void. In *Lazarus v. Cowie* (a), it was held, that inasmuch as the 55 Geo. 3, c. 184, s. 19, expressly prohibited the re-issuing of a bill of exchange which had been paid, and inflicted a penalty on any person doing it, the defence was available by plea. But, in this case, there was nothing illegal in the issuing of the note after the alteration. The only effect of the stamp laws is, that a promissory note unstamped cannot be given in evidence. There is nothing illegal in the contract itself.

Cowling, contra.—The plea is good, for the Stamp Acts may be pleaded. This is clear from the 19th section of 31 Geo. 3, c. 25, which enacts, “that no bill of exchange or promissory note, &c. shall be pleaded or given in evidence,” unless it be stamped. The meaning of that section is, that the plaintiff has no right of action upon an unstamped note; and if so, the defendants may plead that matter. They may either deny the existence of the note, and object to its reception in evidence, or plead that it is not duly stamped or marked with the payment of duty. This point was not decided in *Lazarus v. Cowie*. There the plea to a declaration on a bill of exchange by indorsee against acceptor was, that the acceptance was for the accommodation of the drawer, and without consideration; that, before the indorsement to the plaintiff, the drawer negotiated the bill for his own use, and paid it when due, whereupon it was re-delivered to him; and, after it was due, the drawer indorsed it to the plaintiff without its being re-stamped, or payment of any duty in respect of the re-

(a) 3 Q. B. 459: 2 Gale & D. 487.

issuing; of which the plaintiff had notice. Lord *Denman*, C. J., says, in conclusion, "It is said, however, that the Stamp Acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases; but the 19th section of stat. 55 Geo. 3, c. 184, expressly prohibits the re-issuing a bill of exchange which has been paid, and inflicts a penalty of £50 on any person doing it. A bill issued contrary to such prohibition is certainly void. We think, upon the whole, that the facts may be so pleaded." The Court do not there decide the general question, whether the Stamp Acts may be pleaded, but they certainly intimate that they may. Such a plea might be bad upon special demurrer, but it is, at all events, good on general demurrer. What meaning can the Court give, after the other party has pleaded over, to the word "*complete*" before the alteration, but that it was properly stamped before such alteration? The plea, by the word "re-stamped," must mean that no new stamp was imposed, after the alteration, to make it a good note: the plea is therefore good. Then the replication is bad for not shewing, as it ought to have done, that the note was only inchoate, and not binding until after the alteration; because, if it was a complete and available instrument, it could not have been altered without a new stamp: *Downes v. Richardson* (a); *Bathe v. Taylor* (b); *Jones v. Jones* (c); *Kershaw v. Cox* (d); *Byrom v. Thompson* (e). [Parke, B.—The question is, whether the replication is equivalent to an averment that the note, in its original state, was not binding on the parties.]

1845.
BRADLEY
v.
BARDSELY.

The Court then called upon

Willes.—The plea ought to have shewn that the note

(a) 5 B. & Ald. 674.

(b) 15 East, 412.

(c) 1 C. & M. 721.

(d) 2 Esp. 216.

(e) 11 Ad. & Ell. 31; 3 P. & D. 71. 863.

1845.
 {
 BRADLEY
 v.
 BARDSLEY.

was given under such circumstances, that it could not be made valid by being stamped. There is nothing to shew that it could not have been so stamped in the present case. It may have fallen within the cases provided for by the 3rd section of 37 Geo. 3, c. 136, which enables the commissioners to stamp instruments, which, under peculiar circumstances, have been omitted to be stamped. Or, again, the note, if not within the 3rd section, may possibly admit of being stamped within the provisions of the 5th section, as having borne a stamp of equal or superior value, although of a different denomination. [He also referred to the stat. 5 & 6 Will. & M. c. 21.]

The Court then called upon

Cowling to support the plea.—It is suggested on the other side, that this promissory note may have been stamped originally with an agreement stamp, in which case it is said it might have been re-stamped; but that can hardly be the case, as the note could not then be said to be “complete.” [Parke, B.—The word “complete” cannot be taken to include the stamping. If the Stamp Laws can be pleaded in bar of an action, it can only be in cases where the instrument cannot be made good by being stamped before the trial. The question, then, is, whether the plea is good in substance. The defendant is bound to plead a plea good in omnibus.] If the fact were as alleged by the plaintiff, it ought to have been replied.

PARKE, B.—I am of opinion that the rejoinder is bad, because it takes too large a traverse; for it ought not to have put in issue the intention of the parties “before” as well as “at” the time of making and issuing the note. I think, also, that the replication ought to have shewn that the original instrument was not binding upon the parties, and was not complete before the alteration. But upon

this point, it is unnecessary to give any opinion, because the plea is bad. The instrument might have been stamped in its altered form. The only allegation is, that the instrument was not re-stamped; but it might, for aught that appears in the plea, be stamped before the trial; and, that being the case, the plea affords no answer to the declaration. The plea ought at least to have shewn, although it would not have been good even then, that the note had not been stamped at the time of plea pleaded. I am of opinion, therefore, that the plaintiff is entitled to judgment, on the ground of the insufficiency of the plea.

1845.
BRADLEY
v.
BARDLEY.

ALDERSON, B.—I agree in thinking that the plea is bad. If an alteration in a promissory note makes it bad, unless it be subsequently stamped, it ought to have been alleged in the plea that it was not so stamped before the trial. If the law were, that no promissory note could be enforced unless it were stamped at the time of making it, the plea would afford a good answer to the declaration. But, inasmuch as the note in this case may, for aught that appears, be made good by being stamped subsequently to the alteration, it is no answer to say, that, after the note was made, it was altered without being re-stamped. With respect to the replication, I am not satisfied that the plaintiff has made a good answer to the plea. The rejoinder is clearly bad, for taking too large a traverse.

ROLFE, B.—I also think that the plea is bad. The statute, which says that an unstamped instrument shall not "be pleaded or given in evidence," did not intend to make those facts an answer, which in reality were no answer at all. The plea ought to have shut out every defence of that nature, and have shewn, that, under no circumstances, could the note in this case have been made available.

PLATT, B., concurred.

Judgment for the plaintiff.

1845.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

Dec. 1. The Company of PROPRIETORS of the GRANTHAM CANAL
NAVIGATION v. HALL.

A canal act empowered the company of proprietors to take, for tonnage upon all coals, stones, timber, corn, &c., and other goods, wares, and commodities whatsoever, which should be navigated or conveyed upon the canal, such rates and duties as they should think fit, not exceeding the sum of 2*s*. 4*d*. for every ton, on entering into or passing out of the canal at its junction with the river Trent; and also, not exceeding the sum of 1*s*. 4*d*. per mile for every ton of coal, stone, timber, corn, &c., and other goods, wares, and commodities, except all dung, soil, marl, ashes, and other manure, (other than lime, which should pay half the said tolls), and except gravel, stone, or other materials for mending the roads, which should pass toll-free, which should be navigated or conveyed upon the canal. A subsequent section provided, that no boat or vessel should pass through any lock to be made under the act, without the consent of the company of proprietors, unless such boat or vessel should pay a duty or rate equal to what would be paid by a vessel loaded with a burthen of thirty tons, unless waste water should be running over the regulating weir of such lock, or unless such vessel should be returning after having passed on the canal with a greater burthen than thirty tons:—

Held, that a boat laden with a burthen of manure, though greater than thirty tons, was entitled to navigate the canal, and to pass at any time through the locks, without payment of any toll whatever.

THE above case having been turned into a special verdict (a), pursuant to the leave reserved in the Court below, a writ of error was afterwards brought, and was now argued (b) by

Hill, for the plaintiff in error. — The judgment of the Court below proceeded on the ambiguity in the toll clauses, and that they ought to operate and be construed against the company in favour of the public. That rule does not apply to a case like the present, or, if it does, it is incorrectly expressed. The correct rule is, that the act is to be construed favourably for the public. Now the provision in the 96th section, that no boat or barge whatever shall pass through the locks, except it has before passed with a burden of thirty tons, or on payment of a toll equal to what would be paid by a vessel of thirty tons burden, unless waste water is running over the weir, is

(a) See 13 M. & W. 114, where the facts of the case and the clauses of the act of Parliament are fully stated.

(b) Before *Tindal*, C. J., *Cole-ridge*, J., *Coltman*, J., *Moule*, J., *Wightman*, J., and *Cresswell*, J.

in fact a provision for the benefit of the public, so as to ensure there being sufficient water in the canal to render it available at all times to the public: it imposes a tax upon those who use the canal when there is a deficiency of water, for the general benefit. It seems monstrous to say, that those who are entitled to pass toll-free should use the water without restriction, when others are precluded from doing so. In all the cases cited in the Court below, the toll-payer was the public, and easing him eased the public also. The interest of the persons claiming to use the canal and the public was the same; but here the proposition on the other side would lead to this absurdity, that persons who pay highly for the use of the canal at all times would be checked from passing along the canal when there was a deficiency of water, but that no check is to be imposed on the carriage of manure by private persons, the proprietors of land along the canal. The 82nd section, which gives the right to carry manure toll-free in winter, shews that it was only intended to give this privilege at a time when it was probable there would be plenty of water in the canal. The effect of that section is, first, to impose a gross tonnage of $2\frac{1}{4}d.$ on all goods, &c. entering into or passing out of the canal at its junction with the Trent, and then to give a mileage toll of $1\frac{1}{2}d.$ per ton; the result of which is, that $2\frac{1}{4}d.$ per ton is to be paid for all goods whatever, and the mileage toll for all goods except those which are to be carried toll free. It may be questionable whether dung, soil, &c., are to pass toll-free under any circumstances, like gravel for the use of the public roads, or lime, on payment of half tolls; but at all events, they cannot pass toll-free when there is no waste water running over the weir, for in that case all cargoes whatever are to pay full toll. If the 82nd and 96th sections are construed together, they will be found to produce this effect. The owner of the boat in question thought, no doubt, he had a right to bring it laden with manure toll free, and also to go back toll free; but, under the 96th section, he was liable to a charge as for

1845.
 GRANTHAM
 CANAL
 COMPANY
 v.
 HALL.

1845.
 GRANTHAM
 CANAL
 COMPANY
 v.
 HALL.

a boat of thirty tons. The cargo was "manure or other goods;" the clause applies to all boats whatever, and suspends all privileges.

Hugh Hill, for the defendant in error, cited *Barrett v. The Stockton and Darlington Railway Company* (a), and *The Leeds and Liverpool Canal Company v. Hustler* (b); and was then stopped by the Court.


TINDAL, C. J.—The Court are unanimously of opinion that the judgment ought to be affirmed. The question, in substance, turns upon the 82nd section of the company's act, giving a toll on commodities carried along the canal. The first words of that section are: "That it shall be lawful for the said company of proprietors to take for their own use and behoof, for tonnage upon all coals, stones, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities whatsoever, which shall be navigated, carried, or conveyed upon or through the said intended canal and collateral cut, such rates and duties as the said company of proprietors shall think fit, not exceeding the sum of $2\frac{1}{2}d.$ for every ton, on entering into or passing out of the said intended canal, at its junction with the river Trent, and also not exceeding the sum of $1\frac{1}{2}d.$ a mile for every ton of coal, stone, timber, corn, grain, malt, meal, flour, and other goods, wares, merchandize, and commodities." Supposing these words had stood alone, there could have been no doubt that there would be a duty payable in this particular instance, both on entering the canal, and also a mileage toll. But then follows the exception; and we must see whether that does not exclude the above supposition. The exception is, "except all dung, soil, marl, ashes, and other manure, (other than lime, which shall pay half the said

(a) 2 Man. & G. 134; 2 Scott, (b) 1 B. & C. 424; 2 D. & N. R., 337. R. 556.

tolls), and except gravel, stone, and other materials for mending the roads, which are by that section admitted to pass toll-free," that is, free from both the gross toll and the mileage toll. It seems, therefore, that, under the 82nd section, manure is to pass toll free; probably it was thought that the benefit which would accrue to agriculture by this provision was a sufficient reason for its enactment. Then comes sect. 96, upon which the company found their argument in favour of this claim. They say the effect of that section is, that no boat or barge whatever, with a lading of less than thirty tons, shall pass through the entrance lock, except on payment of a tonnage duty equal to what would be paid by a vessel laden with thirty tons, unless waste water is running over the weir. It seems to us, however, that the proper construction of this section is, that it applies to vessels laden with a cargo of less than thirty tons, such as would pay toll, and that the effect of that section is merely to enlarge the tolls given by the 82nd section: for example, suppose a boat laden with a ton of butter and cheese, or other toll-paying commodities, then it must pay a toll equivalent to a burden of thirty tons, in order to pass the lock; but if it contains manure or other exempted cargo, it is entitled to pass toll free, whatever be its tonnage. For these reasons, we are of opinion that the judgment of the Court below ought to be affirmed.

1845.
GRANTHAM
CANAL
COMPANY
v.
HALL.

Judgment affirmed.



IN this Vacation, *Edwin Sandys Bain*, of Temple, Esq., and *Charles Wilkins*, of Gray' were called to the degree of the Coif, and gave the former with the motto "*A Deo et Regina*," the motto "*Non quo sed quomodo*."

END OF MICHAELMAS VACATION.

INDEX

TO THE

PRINCIPAL MATTERS.

AGREEMENT.

Construction of.

The plaintiff, a schoolmaster, in 1842, contracted with the defendant to rent of him a house and school-room, at the rent of 35*l.* a year; and it was further agreed between them, that, "unless death or continued ill-health in *either case* should take place," the defendant promised to provide two bed-rooms over the intended school-room, but not before the year 1844; and when such rooms should be provided, the plaintiff agreed to pay for them an additional rent of 5*l.* a year. In an action on this agreement, the declaration alleged as a breach, that, although the whole of the year 1844, except a few days, had elapsed, and although *the defendant* had not been prevented by any ill-health, he had not, although often requested, provided the two bed-rooms:—*Held*, on motion in arrest of judgment, after verdict for the plaintiff, that the "continued ill-health in *either case*" meant ill-health of either of the parties, and therefore that the declaration was bad, for not averring that there had been no continued ill-health on the part of the *plaintiff*.
Ireland v. Harris,

432

ANNUITY.

Stamp—Memorial.

In replevin, the defendants avowed for a distress under an annuity deed; which recited that F., who was the beneficial lessee of certain salt-works, in order to raise money for carrying them on, had contracted with K. to grant him an annuity of 1050*l.*, in consideration of 14,500*l.*, and that K., being unable to provide the whole sum himself, had entered into sub-contracts with seven other persons to take portions of the annuity, each advancing a part of the consideration-money; and, after reciting all these contracts, and the payment by the different parties of their respective proportions of the 14,500*l.*, the deed contained a grant by F. to C. and D. of eight several annuities, making together an annuity of 1050*l.*, in trust for the several persons advancing the money, with the usual powers of distress. The avowry then set out two other deeds, by one of which C., and by the other of which S., a trustee nominated in D.'s place under the 1 Will. 4, c. 60, assigned "the said several annuities" to the defendants, who then avowed the taking for a distress in respect of one of the

annuities in arrear, There were similar avowries for arrears of others of the annuities. The plaintiff pleaded in bar, first, non est factum; secondly, that C. did not assign "the said annuity" modo et formâ; thirdly, that D. was not a trustee within the 1 Will. 4, c. 60; fourthly, that S. did not assign the annuity modo et formâ; and lastly, (after craving oyer of the annuity deed), that no memorial was duly inrolled. The defendants joined issue on the first four pleas, and to the fifth replied, that the memorial was duly inrolled; setting it out. The plaintiff rejoined, that the memorial contained certain untrue statements as to the parties beneficially interested, and the pecuniary considerations for the annuities. The defendants surrejoined, that the memorial did truly state the names of the persons by whom the several annuities were to be received, and the pecuniary considerations for granting the same; on which issue was joined:—*Held*, first, that the annuity deed only required a stamp in respect of the aggregate sum paid to F. for the annuity of 1050*l.*, and that it need not be the aggregate of the stamps required on each of the several annuities into which it was divided.

Secondly, that, if there was a variance in stating in the avowries that C. and S. assigned "the said annuity" to the defendants, whereas the legal effect of each of the assignments was to convey a moiety only, this was a defect which ought to be amended at *Nisi Prius*.

The memorial, in the column headed "Consideration, and how paid," first set forth the sums paid by the several sub-purchasers to K., for their several annuities, and then stated the sums paid by K. to F., which it described as composed of 7500*l.* paid by K. as the consideration for his own share of the annuity, and of the other sums paid to K. by the sub-purchasers as

before mentioned. In the former part of the column, there were some inaccuracies in the statement of the manner of payment; but the latter part correctly stated the payments to F.:—*Held*, that the memorial was sufficient.

Seemle, that the onus of proof, upon the issue relating to the memorial, was upon the plaintiff; for that the memorial would be taken to be correct till the contrary was shewn. *Hogarth v. Penny*, 494

ARBITRATION.

I. Arbitrator.

(1). Discretion as to Examination of Witnesses on Oath.

A cause was referred by order of *Nisi Prius*, which stated that "the arbitrators should be at liberty, if they should think fit, to examine the parties and their respective witnesses on oath:—*Held*, that it was discretionary with the arbitrators whether they would examine the witnesses on oath or not, and that it was no objection to their award, that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn. *Smith v. Goff*, 264

(2). Misconduct of Arbitrator.

On a reference of a cause and all matters in difference to arbitration, the plaintiff tendered in evidence his books containing entries made by himself and others on his dictation, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial at *Nisi Prius*, and that, although the books were not strictly admissible, he had authority to receive them, and he accordingly did so; but it did not

appear that he had acted upon them:—*Held*, that this did not amount to misconduct in the arbitrator, so as to authorize the Court to set aside the award. *Hagger v. Baker*, 9

(3). *Power to enter Verdict.*

Where a cause was referred by a Judge's order, which gave no express power to direct a verdict to be entered, but the arbitrators awarded a verdict to be entered, with damages and costs, the Court discharged a rule which had been obtained to enforce the award by attachment, leaving the plaintiff to pursue his remedy by action. *Cock v. Gent*, 680

II. *Award.*

Finding on several Counts.

Where a declaration contained several counts, and the cause was referred by order of a Judge before plea pleaded,—*Held*, that the arbitrator was not bound to find specifically upon each count in the declaration, but might find generally that the plaintiff had good cause of action for a certain sum, and award that the defendant should pay him that sum. *Bearup v. Peacock*, 149

ARREST UNDER 1 & 2 VICT.
c. 110, s. 3.

Admissibility of Affidavits in another Cause.

On an application to a judge to hold a defendant to bail under 1 & 2 Vict. c. 110, s. 3, the plaintiff may use affidavits made and used shortly before on a similar application against the same defendant at the suit of another plaintiff, intitled in the former suit, and in another Court. *Langston v. Wetherell*, 104

ASSIGNMENT.

What it passes.

A deed of assignment by A. of all his personal estate and effects whatsoever to trustees for the benefit of creditors, passes a deed of assignment of leasehold premises, made to A. by way of mortgage with power of sale. *West v. Steward*, 47

ATTACHMENT.

Personal Service of Rule.

Semble, that personal service, even of a rule for an attachment, may be dispensed with where there is no other remedy, and it is satisfactorily shewn that the party knows of the rule and is evading service of it. *In re Whalley*, 731

ATTORNEY.

See BILLS AND NOTES, I, 1.

(1). *Delivery of Bill.*

It is no answer to an action on a promissory note, that it was given on account of an attorney's bill, not delivered before action brought. *Jeffreys v. Evans*, 21

(2). *Taxation of Bill.*

1. *Semble*, that, under the Attorneys and Solicitors Act, (6 & 7 Vict. c. 73, s. 37), all the common-law courts therein mentioned have a common jurisdiction to refer for taxation an attorney's bill for business done in any of them.

Where a surveyor of highways within a parish employed an attorney to conduct an indictment for an obstruction of one of the highways, and to transact other business, and paid his bill out of monies raised by the highway rate,—*Held*, that the rate-payers were not persons "liable to pay," within the meaning of the stat. 6 & 7 Vict. c. 73, s. 38, and could

not, therefore, apply for a reference of the bill to taxation. *In re Barber, Gent., Ex parte The Manchester and Leeds Railway Company*, 720

2. An attorney, on being retained to conduct a cause, gave his client, the plaintiff, the following undertaking:—"Should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only." The plaintiff obtained a verdict, with damages and costs, but the defendant obtained his discharge under the Insolvent Debtors' Act, and the plaintiff only received a dividend of about 7s. in the pound on the amount of his judgment:—*Held*, that the attorney was not, under these circumstances, limited by his undertaking to costs out of pocket only.

The Master having taxed the attorney's bill, allowing him costs out of pocket only, a summons was taken out and heard before a Judge at chambers, who directed the taxation to be as for costs out of pocket. Subsequently, another summons to review the taxation was taken out, and heard before the same Judge, who dismissed it:—*Held*, that the attorney had a right to appeal from this decision to the Court. *In re Stretton*, 806

(3). *In what Court suable.*

A defendant who is an attorney of two of the superior Courts may be sued in either, at the option of the plaintiff. *Walford v. Fleetwood*, 449

BANKRUPT.

See EVIDENCE, II.

I. *Jurisdiction of the Commissioners, and Power of Commitment.*

The plaintiff, being a debtor to a bankrupt's estate, was summoned to appear and be examined before the District Court of Bankruptcy in which the fiat was prosecuted; but, refusing

to come, was arrested by the defendant, the messenger of the Court, under a warrant of the commissioner, and brought up in custody to be examined. He thereupon submitted to be examined, and at the conclusion of his examination, the commissioner said that he was "discharged on payment of the costs incurred in bringing him up," and a memorandum to that effect was indorsed on the warrant. The defendant in consequence detained the plaintiff until the costs incurred in bringing him up were taxed, and paid by him under protest:—*Held*, first, that the above memorandum amounted to an order to detain the plaintiff until the costs were paid.

Secondly, that the commissioner had no jurisdiction under the bankrupt acts to make such an order, and would have been liable to the plaintiff in an action of trespass for the imprisonment under it; and, therefore, that the defendant, who must be assumed to have known of such want of jurisdiction, was also liable.

Semble, that, if the commissioner had had jurisdiction to commit the plaintiff, the defendant would have been protected, though he had no warrant under the hand and seal of the commissioner. *Watson v. Bodell*, 57

II. *Notice of Act of Bankruptcy.*

A notice by a bankrupt to an execution creditor, that "he had committed several acts of bankruptcy," is a sufficient notice of a prior act of bankruptcy, within the 2 & 3 Vict. c. 29. The notice need not state the nature or particulars of any act of bankruptcy. *Udal v. Walton*, 254

III. *Order for Protection.*

1. The plaintiff having obtained judgment against one F. in an action of assault and false imprisonment,

sued out a ca. sa., whereon F. was taken and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape—*Held*, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction.

Semble, that, the judgment debt being in tort, and not in an action for the recovery of a debt, the commissioner had no power to order the prisoner to be discharged out of custody under the above acts of Parliament.
Thomas v. Hudson, 353

2. An action of trespass is not maintainable against the plaintiff in an action, or his attorney, for suing out an execution, and causing the defendant to be arrested under it, the defendant having at the time an order for protection from arrest under the Bankrupt Act, 5 & 6 Vict. c. 116, s. 4, of which the plaintiff had no notice.
Yearsley v. Heane, 322

IV. Payments after Bankruptcy.

A trader committed a secret act of bankruptcy, by leaving his house; but, before he left, desired the defendant, his foreman, who had been accustomed to manage his business for him, to carry it on in his absence. The defendant did so accordingly, and received several sums of money for debts due to the bankrupt, and for goods

VOL. XIV.

sold after the act of bankruptcy. He also made several bonâ fide payments; some to creditors of the bankrupt, for the expenses of housekeeping, and retained some for wages due to himself. The monies were received and the payments made without notice of the act of bankruptcy. An action having been brought by the assignees to recover the money so received as money had and received to their use, the defendant pleaded never indebted, and a set-off:—*Held*, that the defendant was liable to the assignees for all the monies received by him after the act of bankruptcy, and that he was not entitled to set-off any of the payments made by him.

Semble, that the defendant might have protected himself by a special plea, as to the payments and disbursements made by him without notice of the act of bankruptcy, under 6 Geo. 4, c. 16, s. 82, and 2 & 3 Vict. c. 29, s. 1.

Quere, whether the plea of not guilty in trover does not put in issue the wrongful nature of the conversion.
Kynaston v. Crouch, 266

V. Petitioning Creditor's Debt by several Firms.

A debt of 150*l.* or upwards, of which a part is due to several persons as partners, is sufficient, under 6 Geo. 4, c. 16, s. 15, to support a fiat in bankruptcy. *Doe d. Lloyd v. Ingleby*, 91

BARTER.

See GOODS SOLD AND DELIVERED.

BILL OF LADING.

Action upon, by Indorsee of.

A bill of lading is not negotiable like a bill of exchange, so as to enable the indorsee to maintain an action upon it in his own name; the effect

M M M

M. W.

of the indorsement being only to transfer the right of property in the goods, but not the contract itself. *Thompson v. Dominy*, 403

BILLS AND NOTES.

I. Consideration.

1. It is no answer to an action on a promissory note, that it was given on account of an attorney's bill, not delivered pursuant to 6 & 7 Vict. c. 73, before action brought. *Jeffreys v. Evans*, 210

2. To an action against the maker of a promissory note, payable three months after date, the defendant pleaded, that the promissory note was made and delivered by him to the plaintiff for and on account of a judgment debt recovered by the plaintiff against him, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff:—*Held*, that the plea was bad, inasmuch as it shewed there was an existing debt on account of which the note was made, and the giving of the note was evidence of an agreement by the plaintiff to suspend his remedy upon the judgment, which was a sufficient consideration for the note. *Baker v. Walker*, 465

II. Liabilities of Partners on.

Messrs. J. C., R. M., J. P., and T. S., carrying on business as bankers, a promissory note in the following form was signed by R. M.:—"I promise to pay the bearer, on demand, five pounds, value received."—"For J. C., R. M., J. P., and T. S."—"R. M."—*Held*, that the holder of this note had not a separate right of action against the party so signing, but that the firm were liable. *Ex parte Buckley, in re Clarke*, 469

III. Notice of Dishonour.

1. A bill having been dishonoured, notice was given by the holder to the first indorsee, who in due time left at the residence of the drawer his own card and address, on the back of which was written, "Bill for £30, drawn by S. on W., dishonoured, lies due as on the other side." The bill was not lying there, but at the residence of the holder, who had other bill transactions with the drawer:—*Held* to be a sufficient notice of dishonour. *Rowlands v. Springett*, 7

2. It was proved at the trial of an action on a bill of exchange, by a clerk of the plaintiffs' (the indorsees), notice to produce having been given, that, on the day when the bill became due, he wrote a letter to the defendant (the indorser), informing him, that "J. C.'s acceptance due that day was unpaid, and requesting his immediate attention to it:"—*Held* a sufficient notice of dishonour. *Bailey v. Porter*, 44

IV. Order for Payment of Money.

J. M., by indenture, assigned to the plaintiff a ninth part of his share in the residue of the estate of T. H., deceased. By an order of 29th July, 1842, made in a suit in Chancery, of "*Powell v. Norwood*," the Vice-Chancellor ordered the defendants in that suit to retain £250, being part of the produce of J. M.'s share of the residuary estate of T. H., to be paid to such person as the present defendant and J. M. should jointly direct. It was afterwards agreed between the parties, that £50, to be considered as part of the sum of £250, should be paid by the defendant to the solicitors for J. M. and the plaintiff. An action having been brought to recover this sum of £50, the plaintiff tendered in evidence the following document:—"To the executors of T. H., deceased.

Powell v. Norwood. Gentlemen,—We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of £250, being the amount directed by the order of the 29th of July last, to be paid to our order. We are, gentlemen, your very obedient servants, J. M. Dec. 16th, 1842." This document was signed by J. M. only, and was unstamped:—*Held*, (*Rolfe*, B., dissente), that it was not a bill of exchange, and that it was admissible in evidence without a stamp. *Russell v. Powell*, 418

V. Payment of.

The acceptor of a bill of exchange, on its presentation to him when due, did not take it up; but afterwards, on the same day, a person unknown called at the bankers' where it lay, and paid the amount, and received back the bill, with a general receipt indorsed upon it. In an action by the indorsee against the acceptor, the bill was produced by the plaintiff, bearing that receipt:—*Held* no evidence of payment of the bill by the acceptor. *Phillips v. Warren*, 379

VI. Presentment.

Where a bill of exchange drawn by W. C. upon one J. C. was accepted by the latter, payable at the plaintiffs' bank, and the bill was subsequently indorsed by W. C. to the plaintiffs, and on the day when it became due there were no assets of J. C.'s in the bank:—*Held*, in an action by the plaintiffs as the indorsees against the indorser, that it was not necessary to shew a presentment of the bill to the acceptor. *Bailey v. Porter*, 44

VII. Pleading.

To an action by the indorsee against the maker of a promissory note, the defendant pleaded, that he made the note and indorsed it to the London

and Westminster Bank, as a collateral security for certain advances made or to be made to the Marylebone Bank, upon the terms, that, if those advances should be repaid before the note became due, the defendant should not be called upon to pay it. The plea then averred, that the advances so made were repaid before the note became due; that he had no value for his indorsement; and that the note was indorsed to the plaintiff after it became due. Replication, *de injuriâ*:—*Held*, that it was an essential allegation, without which the plea must fail, that the advances were repaid before the note became due; and therefore that it was a misdirection, for the judge, on the trial of this issue, to tell the jury, that, if the note was given as a part security for the advances so made to the Marylebone Bank, the defendant was entitled to a verdict. *Richards v. Macey*, 484

BYE-LAW.

1. By a local act, 6 Geo. 4, c. lxxi, the company of proprietors of a public navigation were empowered to make bye-laws for the good government of the company, and for the good and orderly using the navigation, and also for the well-governing of the bargemen, watermen, and boatmen, who should carry any goods, wares, or merchandise upon any part of the said navigation, and to impose and inflict such reasonable fines or forfeitures upon all persons offending against the same, as to the major part of the company should seem meet, not exceeding £5.—The company made a bye-law, that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time, (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor

should any boat, &c. pass along any part of the said navigation on any Sunday, except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to, or returning from, any place of divine worship, under a penalty of £5:—*Held*, that the act did not authorize the company to make the above bye-law, and that it was illegal and void. *The Calder and Hebble Navigation Company v. Pilling*, 76

2. The Plumbers' Company of London were incorporated by a charter of James I, and empowered thereby to make bye-laws. They made a bye-law, that the master and wardens might call, choose, elect, and admit into the livery of the company such person free of the art or mystery of plumbing as they should think fit; and that every person so chosen should, immediately upon notice thereof, prepare himself to serve the same place at the then next meeting of the master and wardens, in such seemly and decent manner as formerly had been used; and that every person, so called and chosen into the same livery, and accepting the same, should use, wear, and keep the same livery, according to the usage and warning given him for that purpose; and that the same person, so called and chosen into the same livery, and accepting the same, should bring in and pay at the next meeting, unto the master and wardens, to the use, maintenance, and relief of the company, and to the officers of the company, for entering the same and for the warning given, such fees as formerly had been paid in like cases; "and which of them soever, so called and chosen into the same livery, refuseth to pay the said fees, or what person or persons, so called and chosen to be of the same livery, and refuseth the same, shall forfeit and pay to the

master and wardens for the time being, for every such default, the sum of £5, or less, at the discretion and pleasure of the master and wardens, so it be not less than 40s."

In a declaration in debt on this bye-law, against a person who had been elected into the company, and taken the oath to obey the bye-laws:—

Held, first, that the bye-law was not bad for uncertainty in the amount of the penalty:

Secondly, that the declaration was not bad for not shewing that the company was a company that had a livery, a livery being mentioned in the charter and bye-law:

Thirdly, that it was not bad for not shewing that the defendant was a freeman of the city of London; for that the Court could not take notice that none but freemen of the city were admissible into the livery of a company, unless it had been certified to the Court by the Recorder of London:

Fourthly, that the master and wardens alone might sue for the penalty, though it was reserved to the use of the company generally.

The breach alleged in the declaration was, that the defendant, although requested, and although a reasonable time had elapsed, and although he was and continued such freeman, did not nor would attend or serve the said place to which he had been so chosen, and did not nor would attend and serve the said place at the next meeting, or at any subsequent meeting of the master and wardens, but therein made default, and refused to prepare himself to serve the said place:—*Held*, that the breach was well assigned; for that one refusal, to which by the bye-law the penalty was attached, was the refusal to prepare to serve, and to serve at the next court. *Piper v. Chappell*, 624

CHARTER-PARTY.

Freight.

1. A charter-party stipulated that the ship should proceed from London to Bombay, and, being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo "on being paid freight at and after the rate of £4 per ton," &c. By a subsequent clause it was stipulated, that the freight was to be paid "on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom-house:"—*Held*, that, upon the construction of these stipulations taken together, the freight was not payable until two months after the inward report; and the shipowner had not, after the cargo was discharged pursuant to the charter-party, any lien thereon for the freight. *Alsager v. The St. Katherine's Dock Company*, 794

2. The defendant chartered a vessel for a voyage from London to Bombay, at which port she was addressed to G. & Co., the defendant's agents there; and by another charter-party of the same date, it was agreed that the ship should, after discharging her cargo at Bombay, take in a homeward cargo, for which the defendant agreed to pay freight, as to one-half the cargo, at £3 per ton, and as to the rest, at the current rate of freight when the ship should be loading. In this latter charter-party, there was also a stipulation, that the master of the vessel (who was a part owner) and G. & Co., the agents at Bombay, were at liberty to make such alterations in the charter-party as they might mutually think proper, without prejudice to that agreement. Soon after the arrival of the ship at Bombay, the master and G. & Co. entered into a written agreement (which was in-

dorsed on the second charter-party) that the ship might proceed to Aden with government coals and stores (her outward cargo), and return to Bombay with all possible despatch, without prejudice to the charter-party. She accordingly, in the month of February, sailed to Aden, and there discharged her cargo, and returned to Bombay, where she arrived in May. The owners received a large sum as freight for this voyage to Aden:—*Held*, that the defendant was bound by the alteration made in the charter-party by G. & Co., permitting the voyage to Aden, which was within the scope of the authority given to them by the stipulation above mentioned; and, therefore, that he was bound to pay the charter-rate of £3 per ton for half the cargo, although that exceeded the current rate of freight at the time of the loading, and although the alteration might be prejudicial to his interests; and that he was not entitled to have the freight earned by the owners on the voyage to Aden brought into the account. *Wiggins v. Johnston*, 609

COAL MINES.

Construction of Lease of.

The lessees under a lease of coal mines covenanted thereby, that they would deliver to the lessor two equal thirteenth parts of all coal which should be raised from the mines demised during the term, or would pay him quarterly the value thereof in money; and that, in case, at the end of the first quarter of any year, such quarterly deliveries should not have equalled in value, or such quarterly payments should not have equalled in amount the sum of 38*l.* 10*s.*, the lessees should also pay, at the end of every such first quarter, such additional rent or sum as should make up the sum of

894 CONTRACT OF SALE.

38*l.* 10*s.*; and in case, at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equalled in value or amount the sum of £75, then the lessees should also pay, at the end of the second quarter, such further sum as would make up £75; and in case, at the end of the third quarter, such deliveries or payments for that and the two preceding quarters should not have equalled in value or amount the sum of 11*l.* 10*s.*, then the lessees should pay, at the end of the third quarter, such further sum as would make up 11*l.* 10*s.*; and in case, on the 24th June, in any year, the deliveries or payments for that and the three preceding quarters should not have equalled in value or amount the sum of £150, the lessees should pay, on the 24th June, such an additional sum as would make up £150; it being the intent and meaning of the parties, that the royalties thereby reserved should always amount to £150 per annum at the least:—*Held*, that, in calculating the amount of royalty due to the lessor at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter against a deficiency in the previous quarter; but that the lessees were entitled, at the end of each quarter, to the full sum of 38*l.* 10*s.* *Bishop v. Goodwin*, 260

CONDITION PRECEDENT.

See DEED.

CONTRACT OF SALE.

Dependent Agreements.

The plaintiffs, Messrs. A. & Co., and the defendant, entered into the following contract:—“Bought of Messrs. A. & Co., about thirty packs of Cheviot fleeces, ewes and hogs;

COPYRIGHT.

and agreed to take the under-mentioned *noils* [coarse woollen cloths]; also agreed to draw for £250 on account at three months.” The quantity and quality of the noils were then specified:—*Held*, that this was one entire contract, and that A. & Co. could not sue for the non-delivery by the defendant of the noils, without averring the delivery or tender to the defendant of the fleeces. *Atkinson v. Smith*, 695

COPYHOLD.

License to demise—Fine.

On the 8th of February, 1810, a license was granted by the lord of a manor to a copyholder, to demise part of his copyhold premises to A. K. for seventy-one years, saving to the lord all fines &c., in as ample a manner as if the license had not been granted. On the 4th of April, 1810, a second license was granted to him to demise the remainder of the copyhold tenement (excepting the land demised to A. K.) for the term of seventy-one years, with this condition, “that, in consequence of his engagement to improve the said premises, and paying unto the lord a fine for his license, it is hereby agreed, that, during the said term of seventy-one years, the fine on all future admissions shall be at and after the rent of £37 per year, for *the whole*, and so in proportion for every less quantity of land:”—*Held*, that the words “the whole” meant the whole of the residue which had not been demised to A. K.; and that the executors of the copyholder were bound to pay, on their admission to the whole of the premises, not only the two years’ improved value on £37 per annum, but also two years’ improved value of the premises demised to A. K. *Curtis, Bart., v. Scales*, 444

COPYRIGHT.

A foreign author, residing abroad,

who composes and publishes his work abroad, has not, at common law, or under the stats. 8 Anne, c. 19, and 54 Geo. 3, c. 136, any copyright in this country.

Therefore, a person to whom he transfers abroad, by an instrument not under seal, but which is valid according to the law of that country, the copyright of the work in England, has no right of action against a British subject who afterwards publishes the work in England. *Chappell v. Purday*, 303

COVENANT.

(1). *Construction of.*

1. In covenant, the declaration alleged, that the defendants, The Great Western Railway Company, demised to the plaintiffs certain refreshment-rooms at Swindon for ninety-nine years, at the annual rent of 1*d.*; that the plaintiffs covenanted (*inter alia*) to keep the premises in repair, and not to carry on there any other business than that of the refreshment-rooms; and that the defendants covenanted with the plaintiffs, that, in case the Swindon station should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiffs on the terms therein mentioned; that it was by the said indenture *declared to be the intention* of the defendants, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by the plaintiffs in erecting the refreshment-rooms, the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return by the profits of the rooms; and that all trains carrying passengers, not goods trains or to be sent express for special purposes, which should pass the Swindon station, should, save in case of emergency

or unusual delay arising from accident, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that the defendants covenanted with the plaintiffs not to do any act *which should have an effect contrary to the above intention*. The breach alleged was, that the defendants, whilst the Swindon station was used as the regular and general place of stoppage for the refreshment of passengers, did divers acts which had an effect and were contrary to the intention of the defendants in the said indenture; that is to say, they caused divers trains containing passengers, not being trains sent express, &c., to pass the Swindon station without stopping there for refreshment of the passengers for a reasonable period of ten minutes; and the defendants caused several trains to stop, and the same did stop, at Swindon, for a short and unreasonable time, to wit, for one minute and no more, the said period of time not being sufficient to enable the said passengers to obtain refreshment.

The defendants set out the deed on oyer, which corresponded with the statement of it in the declaration, except that the terms of the covenant declared on were, that the defendants *engaged* not to do any act which should have an effect contrary to the above intention.

Held, on demurrer, that this amounted to a covenant on the part of the company not to do any act to prevent the trains from stopping at Swindon, so long as it was used as the regular refreshment-station; and, secondly, that a good breach of that covenant was alleged in the declaration. *Rigby v. The Great Western Railway Co.*, 811

(2). *For Non-repair.*

Semble, in covenant for non-repair, the declaration ought to state the

term for which the premises were demised. *Turner v. Lamb*, 412

(3). *Where Covenantors to sue jointly.*

A declaration in covenant stated, that, by indenture of lease, Sir E. W. and J. A. A., (who were seised in fee of an undivided fourth part of the premises in trust for E. M. F.), E. F., and E. M. F. his wife (the cestui que trusts), M. W., who was seised in fee of another undivided fourth part, W. T., who was seised in fee of half, and G. T. and S. T., who had equitable interests in that half, jointly demised, according to their several estates, rights, and interests in certain coal-mines, to the defendant and two others, yielding and paying certain rents to the said E. F., E. M. F., Sir E. W., J. A. A., M. W., S. T., G. T., and W. T. respectively, and to their respective heirs and assigns, according to their several and respective estates, rights, and interests in the premises; that the defendant and the two other lessees covenanted with all the above parties, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns, respectively, at the end of the term, and to work the mines properly. The declaration then deduced to the plaintiff a title to the moiety of the said W. T., and alleged as breaches the non-repair of the premises, and the improper working of the mines. Plea, that J. A. A. was the survivor of all the covenantors:—*Held*, that the covenantors were joint, and not several, and that the surviving covenantor ought to have brought the action.

Quære, whether one of several tenants in common, lessors, can sue on a covenant to repair made with all. *Bradburne v. Botfield*, 559

COSTS.

See HABEAS CORPUS.

(1). *On rule for New Trial.*

Where, on the first trial of a cause, the plaintiff obtains the verdict, and a rule is afterwards made absolute for a new trial, "the costs to abide the event," and the defendant succeeds on the second trial, neither party is entitled to the costs of the rule for a new trial. *Eccles v. Harper*, 248

(2). *Security for.*

Where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will require security for costs. *Perkins v. Adcock*, 808

DEED.

I. *Construction of—Condition precedent.*

In an action of debt to recover a sum of money under two deeds of covenant, the declaration alleged, that, by an indenture of the 19th of December, 1837, in consideration of the sum of 258,629*l.* 10*s.* 6*d.*, the plaintiff covenanted with the defendants to make and complete a certain portion of a certain railway, and to provide bars or rails and chairs, on or before the 1st of May, 1840; that afterwards, by another indenture of the 23rd of March, 1839, in consideration of the further sum of £15,000, the plaintiff covenanted with the defendants, that he the plaintiff, being provided by them with railway bars or rails and chairs for temporary and permanent use, would complete the said portion of the said railway, and the line of the permanent railway, on or before the 1st of June, 1840; provided, that, if the said plaintiff should not com-

plete the said railway by the said 1st of June, 1840, he should pay to the said defendants the sum of £300 for the said 1st of June, and the like sum for every succeeding day, until the whole should have been completed, but so that the total amount to become forfeitable should not exceed the sum of £15,000. Breach, that the defendants detained from, and did not pay the plaintiff a large sum, to wit, £20,000, parcel of the sum due to the plaintiff. Plea, as to £7500, parcel of the said sum of £20,000, that the said sum of £7500 is parcel of the said sum of £15,000 agreed to be retained by the defendants; that the plaintiff did not complete the said railway on or before the 1st of June, 1840, nor until twenty-four days after, whereby the plaintiff then became liable to pay to the said defendants the sum of £300 for the 1st day of June, and the like sum for every such succeeding twenty-four days during which the railway remained incomplete, by reason of which the defendants deducted and retained the said sum of £7500 out of the monies payable by them to the plaintiff. Replication, that the plaintiff did not become nor was liable to pay the defendants *modo et formâ*.—At the trial, it was proved that the plaintiff did not finish the railway until twenty-four days after the 1st of June, but that the defendants had not provided the plaintiff with the bars, rails, and chairs in sufficient quantity to enable him to complete it by that day. The learned judge told the jury that the defendants were bound, as a condition precedent to their right to deduct the £7500, to furnish the plaintiff with such bars, rails, and chairs:—*Held*, that that was a misdirection; that the covenants were independent; and that the furnishing of the bars, rails, and chairs was not a condition precedent to the right of the defendants to make

the deduction; and that, the only question being whether the railway was completed on the 1st of June, the plea was established. *Macintosh v. The Midland Counties Railway Co.*, 548

II. *Erasure in.*

A. executed to B. and C. a deed of trust for the benefit of creditors, purporting to be made between him of the first part, B. and C. of the second part, and the several other persons whose names and the amount of whose debts were set out in a schedule thereunto annexed, being creditors of A., of the third part. At the time of its execution by A., there was no schedule annexed; when it was produced in evidence, (in an action of trover by A. against B. and C. for a mortgage deed alleged to have passed under it), it had a schedule annexed, consisting of the signatures of certain of his creditors, some of which had been erased, and others had no sums set against them:—*Held*, that the deed was not avoided thereby. *West v. Steward*, 47

DEVISE.

I. *Enlargement of Estate for Life into Estate in Fee by Charges.*

A testator, after charging certain lands with an annuity to his wife for her life, and giving them successively to several persons for life, devised them as follows:—"And, from and after &c., I give and devise the same (but subject and charged as aforesaid) to such person or persons as at the time of my decease shall be the heir or heirs-at-law of William Hull, formerly of Pisford, Esq., who was formerly the owner of the said messuages, &c., and who devised the same to my first wife Lydia, and which estate and premises descended to and became

vested in my late son, W. G., as the only son and heir-at-law of my said late wife Lydia, and which said premises, &c. my said son W. G. devised to me in fee simple:—*Held*, that the words “such person or persons as at the time of my decease shall be the heir or heirs-at-law of W. H.” were merely a designatio personæ; and that the person answering that description took an estate for life only in the devised premises.

A devise of an indefinite estate, without words of limitation, *primâ facie* is a devise for life only; and a previous charge on the *estate*, without any charge on the devisee in respect of it, will not enlarge it into a devise of an estate in fee. *Doe d. Sams v. Garlick*, 698

II. Vesting of Estate—Descent to Person of particular Name.

A testator devised real estates to his son and heir-at-law, Reginald H., for life, remainder to his first and other sons in tail, remainder to his daughters in fee; and, for default of such issue, to his nephew Reginald H., for life, remainder to Richard H., son of his said nephew, for life, remainder to his first and other sons in tail; and, in default of Richard's being alive at his father's death, or in case of his being alive and taking an estate under the will, and dying without issue male, then to the use of the male heir who should be in possession of the ancient estate at M., belonging to the H. family, for life, and to his first and other sons in tail; and, for default of a male heir being in possession of the ancient estate at M., or in default of issue male of such male heir, then to the use of the testator's own right heirs, being of the name of Heber, in fee.

Reginald H. the son enjoyed the estate for life, and died without issue;

then Reginald the nephew, and Richard, successively enjoyed it for life, and the latter died without issue; and at his death there was no heir of the testator existing of the name of Heber:—*Held*, that the ultimate limitation in fee vested, on the death of the testator, in his son and heir-at-law, Reginald H. *Wrightson v. Macaulay*, 214

EJECTMENT.

Where the declaration in ejectment was intitled of Trinity Term, 9th (instead of 8th) Vict., and the notice had no date, but required the tenant to appear in *next Michaelmas Term* (1845), and a regular service was effected before that Term, the Court granted a rule for judgment. *Doe d. Gyde v. Roe*, 788

EVIDENCE.

See BILLS AND NOTES, VI.

I. Admission of Documents under Judge's Order.

A judge's order for the admission of documents in evidence referred to a notice served by the defendant's attorney, dated 4th March, 1845. The notice produced was dated the 1st March, but the plaintiff's attorney stated that it was the only notice served in the cause:—*Held* sufficient. *Bittleston v. Cooper*, 399

II. Competency of Witness.

A bankrupt is a competent witness, in an action by his assignees against parties claiming under an execution, to prove notice to them of a prior act of bankruptcy.

Semble, also, he is competent, since the 6 & 7 Vict. c. 85, to prove the petitioning creditor's debt or act of

bankruptcy, or any fact which tends to support the commission. *Udal v. Walton*, 254

III. Of Liability as Partner.

A banking company was established in 1836, under a deed of settlement, which provided that the business of the company should be carried on at Douglas, in the Isle of Man, and such other places as should be determined on, pursuant to the clause thereafter contained for that purpose, viz. by the unanimous vote of the directors, convened in a particular manner. The defendant, who resided at Huddersfield, was an original shareholder in the bank, and continued so until its stopping payment in 1843. In 1839, a branch bank was opened at Castletown, and the business was carried on there, as well as at Douglas, till 1843:—*Held*, that, under the circumstances, the mere lapse of time was evidence against the defendant, either that the Castletown branch was regularly established pursuant to the requisites of the deed, or that, if it was not, he knew of and assented to its establishment otherwise, so as to make him liable to a depositor at that branch. *Crellin v. Calvert*, 11

EXCISE.

The 25th and 26th sections of the Excise License Act, 6 Geo. 4, c. 81, which subject to penalties any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises in manner therein mentioned; or who shall manufacture, deal in, retail, or sell tobacco without taking out the license required for that purpose, do not avoid a contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections. Their effect is merely to

impose a penalty on the offending party for the benefit of the revenue.

But where it appears that the intention of the legislature was to prohibit the contract itself, although that be only for purposes of revenue, the contract is illegal and void, and no action can be maintained upon it.

An allegation in a plea, that the tobacco, for the price of which the action was brought, was sold by the plaintiffs "as manufacturers of tobacco," after the stat. 6 Geo. 4, c. 81, and that they had not a license under that act, is not a sufficiently direct allegation that the plaintiffs *were* manufacturers of tobacco, so as to come within the provisions of the act. *Smith v. Mawhood*, 452

EXECUTION.

I. In Action on Judgment under £20.

Since the 7 & 8 Vict. c. 96, a defendant may be taken in execution, in an action on the judgment recovered, though the debt recovered in the former suit was under £20, and the second action is brought within a year. *Mason v. Nicholls*, 118

II. Seizure and Sale of Lease.

Trespass against the sheriff for breaking and entering the plaintiff's dwelling-house. Plea, that the defendant entered under a *fi. fa.*, and seized and took in execution a lease of the plaintiff's of the said dwelling-house, under which the plaintiff held and was possessed of the same, and, before the return of the writ, *sold* the term, and continued in possession of the house for the further execution of the writ. The plaintiff new assigned, that the defendant continued in possession an unreasonable time after he had seized and taken in execution and sold the lease. To this

new assignment the defendant pleaded, that the dwelling-house in the new assignment mentioned was not, at the time of the committing of the trespasses newly assigned, the dwelling-house of the plaintiff. At the trial, it appeared that the sheriff had sold the lease by auction, but that no assignment had been executed by him to the vendee:—*Held*, that the seizure did not vest the term in the sheriff, but that it remained in the debtor until the sheriff executed an assignment to the purchaser; and that, whether the word “sold” imported an actual assignment or not, the sheriff could not justify remaining an unreasonable time in the house; and, therefore, that the plaintiff was entitled to have the verdict entered for him on the plea to the new assignment. *Playfair v. Musgrove*, 239

FACTORS ACT.

A., residing abroad, being the owner of goods, consigned them, by bill of lading making them deliverable in London, to the consignee, or his assigns; and, having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive and sell the goods. The factor received the goods, entered them in his own name at the Custom-house, and obtained, without the privity or express consent of the owner, a dock-warrant in his own name, it being the usage at the docks to give such document to the person in whose name they are entered, and pledged such dock-warrant for advances beyond the charges for which the factor had a lien:—*Held*, that, under these circumstances, the factor was not intrusted with a dock-warrant, within the meaning of the stat. 6 Geo. 4, c. 94, s. 2.

A party intrusted with the bill of lading for the purpose of selling the goods mentioned in it, is not, in con-

FALSE REPRESENTATION.

sequence of being so intrusted, to be considered as intrusted with the dock-warrant, notwithstanding that his possession of the bill of lading, and of the goods under it, enables him to obtain the dock-warrant. *Hatfield v. Phillips*, 665

FALSE IMPRISONMENT.

Notice of Action.

A notice of action to justices, under the 24 Geo. 2, c. 44, stated the cause of action thus:—“For that you, on the 10th day of May, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, &c., and to be forced and compelled to go along divers public streets and roads, &c., to a certain prison, to wit, at Louth, in &c., and to be unlawfully imprisoned and kept in prison there, for forty days then next following,” &c. At the trial, the proof was confined to the imprisonment in the gaol at Louth, under an invalid warrant of the defendants:—*Held*, that the notice sufficiently stated the *place* of the injury, so as to enable the plaintiff to recover in respect of such imprisonment. *Jackson v. Fytche*, 381

FALSE REPRESENTATION.

When actionable.

Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller:—*Held*, that an action on the case for a false and fraudulent representation was not maintainable, without shewing that such representation was false to the knowledge of

GOODS SOLD & DELIVERED.

the seller, or that he acted fraudulently or against good faith in making it. *Ormrod v. Huth*, 651

FELON.

Reward for Apprehension of.

A hand-bill relating to a stolen parcel offered a reward of 100*l.* to "whoever should give such information as should lead to the early apprehension of the guilty parties:"—*Held*, that the information must be given, not in mere conversation, but with a view to its being acted on, either to the person offering the reward or to his agent, or to some person having authority by law to apprehend the criminal. And where the communication was first made by the plaintiff to C. in conversation, but the information was communicated to a constable jointly by the plaintiff and C., it was held that they both ought to have joined in the action. *Lockhart v. Barnard*, 674

GUARDIAN.

See INFANT.

GUARANTIE.

See PLEADING, (*Declaration—Variance*).

GOODS SOLD AND DELIVERED.

Barter.

Where two parties agreed to barter goods for goods, and, the balance being in favour of the plaintiff, the defendant omitted for nearly three years to send goods to meet it, upon which the plaintiff brought an action for goods sold and delivered,—*Held*, that the

HORSE-RACE. 901

lapse of time did not entitle the plaintiff to maintain such an action, but that his remedy was by action against the defendant for not delivering the goods pursuant to the contract between them. *Harrison v. Luke*, 139

HABEAS CORPUS.

Costs.

Where a party, being in custody for contempt for not putting in an answer to a bill in equity, applied to the Court for a writ of habeas corpus ad subjiciendum, and the Court granted the writ, and directed notice thereof to be given to the plaintiff in the cause, who, upon the return of the writ, opposed the prisoner's discharge, and he was remanded to his former custody:—*Held*, that the Court had no authority to give the plaintiff costs. *In re Cobbett*, 175

HORSE-RACE.

Decision of the Stewards binding.

The plaintiff entered his horse for a steeple-chase, one of the conditions being, that no groom or professional jockey would be allowed to ride; and another, that all disputes and other matters should be decided by the steward, whose decision should be final. The plaintiff intended his horse to be ridden by one W., but, before the day of the race, was informed by the steward that he considered W. a professional jockey, and that the horse, if ridden by him, would be no horse in the race. The plaintiff insisted that W. was qualified; and on the race-day, notwithstanding a similar intimation from the steward to the plaintiff, W. rode the horse, which came in first. On the following day, the steward pronounced the second horse to be the winner, and by his directions the

stakes were paid to the owner of that horse:—*Held*, that the steward had decided the question, within the meaning of the condition; that his decision was final (although it was not made after hearing both parties); and that the plaintiff could not recover the stakes from the stakeholder. *Benbow v. Jones*, 193

INCLOSURE ACT.

I. Construction of.

1. Where an inclosure act directed that the commissioners should set out and allot a certain portion of the common lands for the getting of stone, gravel, and other materials, for the repairs of the highways and other roads to be set out under the act, and for the use of the inhabitants within the parish:—*Held*, that this did not authorise the inhabitants to take such materials for their private purposes, but only for the repairs of the roads. *Rylatt v. Marfeet*, 233

2. Certain waste lands in the manor of Shipley, to the soil of which, and everything constituting the soil, the lord of the manor was entitled, were, by an Inclosure Act, 55 Geo. 3, c. 18, (which recited the lord's title), taken away from the lord and allotted to commoners, except as saved by the 32nd clause. That clause reserved to the lord all mines and minerals, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as he could or might have held and enjoyed the same in case the said act had not been made; and enacted, that he should and might at all times thereafter have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind soever, within and under the said commons and waste grounds, with full

INCLOSURE ACT.

liberty of digging, sinking, searching for, winning, and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron-stone and fossils, to be gotten thereout: provided that the lord, in the searching for and working the said mines and minerals, should keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata. The 33rd section provided for reimbursement to the owners of allotments, for injury done by searching for or working mines and minerals:—*Held*, that the reservation clause must be construed with reference to the title of the lord to the whole of the soil; and, inasmuch as the object of the act was to give to the commoners the surface for cultivation, and leave in the lord what it did not take away for that purpose, the word "minerals" must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; and this notwithstanding the provision in the latter part of the clause, authorising the carrying away the "lead ore, lead, coal, iron-stone, and fossils," as fossils may apply to stones dug in quarries: therefore, that the clause reserved to the lord the right to the stratum of stone in the inclosed lands. *Earl of Rosse v. Wainman*, 859

II. Way-leave to carry off Minerals.

An act of Parliament for inclosing the moors and commons within the manor of Lanchester, in the county of Durham, contained a saving of all the seignorial rights of the Bishop of Durham as lord of the manor, and also provided, that the bishop and his successors, and their lessees and assigns, should at all times thereafter

INFORMATION.

work and enjoy all mines and quarries being under the said manors and commons, together with all convenient and necessary ways and way-leaves over the same, and full and free liberty of making and using any new roads or wagon-ways over the same, and for that purpose to remove obstructions, &c., and of winning and working the said mines and quarries belonging to the see and bishopric of Durham, wheresoever the same should be, and of leading and carrying away all the coals, minerals, &c. to be gotten thereout, or out of any other lands and grounds whatsoever, &c.:—*Held*, that this clause entitled the bishop to carry over the lands inclosed under the act, not only coals and minerals got within or under those lands, but also those got out of any other mines belonging to the see of Durham; but not to carry coals, &c. got out of other mines worked by the bishop, but not belonging to the see.

Held, also, that an allegation, that a certain colliery was within and parcel of the manor, was not a sufficient allegation that it was a colliery belonging to the see. *Midgley v. Richardson*, 595

INFANT.

Testamentary Guardians.

Where two persons are appointed joint testamentary guardians of an infant, under 12 Car. 2, c. 24, s. 8, trespass lies by one of them against the other, for forcibly removing the infant from the lawful service of the former, against his consent. *Gilbert v. Schwenck*, 488

INFORMATION.

Plea of Not Guilty.

An information at the suit of the Attorney-General stated, that the

INSOLVENT DEBTORS ACT. 903

Queen was seised in her demesne as of fee of Waltham Forest, and that the Queen and her ancestors had enjoyed the said forest, and the game of beasts and fowls of forest, chase, and warren therein, and all rights &c., appertaining thereto, without disturbance, until the defendant unlawfully made a fence and ditch on the soil of the forest, and inclosed five acres thereof, and separated the same from the residue of the forest, and encroached and usurped thereon, to the great injury and disturbance of the Queen in her said forest, to the damage and destruction of the vert and venison therein, and to the disinherison of the Queen:—*Seemle*, that a general plea of not guilty might be pleaded to this information. *Att-Gen. v. Brown*, 300

INSOLVENT DEBTORS ACT (IRELAND).

Construction of.

An action of trespass cannot be maintained against a creditor, who, without malice, sues out a writ of *ca. sa.* upon a judgment regularly obtained by him against his debtor, after the debtor's discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107. The 81st and 82nd sections of that statute do not render the writ absolutely illegal and void *ab initio*, but only give the debtor a remedy, by application to the Court or a judge, for his discharge out of custody. *Ewart v. Jones*, 774

INSOLVENT DEBTORS ACT.

Protection of Debtor.

The defendant, an insolvent debtor, inserted the plaintiff as a creditor in his schedule, but, by mistake and without fraud, stated the debt to be £3, whereas in fact it was £7:—*Held*,

that, inasmuch as the creditor was thereby deprived of the benefit of the notice to be given to creditors for 5*l.* and upwards, under the 71st section of the Insolvent Debtors Act, 1 & 2 Vict. c. 110, this was not a case within the protection of the 93rd section, and the defendant's discharge under the act was no bar to an action for this debt. *Hoyles v. Blore*, 387

INTERPLEADER ACT.

The Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1, does not apply in favour of a party who is sued by a person from whom he has bought goods, for the price, and also by third parties, for the value of the goods in trover. *Slaney v. Sidney*, 800

LANDLORD AND TENANT.

Tenancy from Year to Year.

By a lease, dated 28th April, 1834, certain premises were demised to T. E., to hold from the 1st May then next, for forty years, at the rent of £55 a year, payable half-yearly, on the 1st November and 1st May. The lease contained a covenant by T. E. not to underlet without the consent in writing of the lessors, and a proviso for re-entry in case he should commit any act of bankruptcy, on which a fiat should issue, under which he should be duly found and declared a bankrupt. In December, 1838, T. E. underlet a part of the premises to the defendant, with the consent in writing of the lessors, for twenty-one years, at a rent of £25 per year. In November, 1840, T. E. committed an act of bankruptcy, on which a fiat issued, under which, in February, 1841, he was found and declared a bankrupt. The lessors thereupon brought an ejectment against T. E., but did not serve it upon the defendant. T. E. let judgment go by default, and the writ of possession was

executed on the 12th May, 1841. The defendant remained in possession of the part underlet to him. In February, 1843, an execution was levied on his goods, and the lessor served the sheriff with notice, that 25*l.*, "a year's rent due in November last," was in arrear from the defendant to them, and required the sheriff to pay over the same out of the levy which he did accordingly. On the 29th April, 1843, the defendant was served by the lessors with a notice to quit:—*Held*, in ejectment brought against the defendant, on a demise dated 4th May, 1844, that the proper inference to be drawn from the fact above stated was, that the defendant's tenancy from year to year to the lessors commenced on the 12th May and, therefore, that the demise was laid too soon. *Doe d. Lloyd v. Ingleby*, 9

LEASE.

Stamp.

Where a piece of land was demised for ninety-nine years, at an annual rent of £8, and the lease contained a covenant that the lessee should, within a year from the granting of the lease build a dwelling-house on the land and expend the sum of £150 at the least upon it—*Held*, that a stamp of £1 was sufficient. *Nicholls v. Cross* 4i

LEGACY DUTY.

1. A testator bequeathed to trustees a sum in the £3 per Cent. Consols, in trust, as to £1700, part thereof, to pay and apply the dividends in establishing and supporting a daily school at N., for the instruction of twenty boys, on the principle of a national school; the dividends to be retained by R. B., sen., and R. B., jun., (two of the trustees), to be so applied; and he directed that R. B., jun., should be the schoolmaster, and that the management of the school should

always remain in the family of R. B. And as to £400, other part of the said stock, the testator directed that the dividends should be paid by the trustees to and applied by the school-master for the time being of the said school, in providing the boys with pinafores, caps, and shoes, and also with books and slates; such clothes, books, and slates, to be left behind them on leaving the school:—*Held*, that these bequests were subject to legacy duty. *In the Matter of John Griffiths, deceased*, 510

2. A., by deed dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son, for life, with remainders over. The deed contained a proviso, that it should be lawful for B., by his last will, to limit and appoint, to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of £700, to be charged upon and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit. B., by his will, by virtue of this power, appointed an annuity of £700 a year to C. for her life, charged upon and payable out of the said land:—*Held*, that legacy duty was not payable in respect of such annuity. *Attorney-General v. Marquis of Hertford*, 284

LIFE ASSURANCE.

Concealment of material Facts.

Assumpsit on a policy of assurance on life, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the insurance company before the execution of the policy, should be untrue. In this declaration the

assured stated, that "he was at that time in good health, and not afflicted with any disorder, nor addicted to any habit tending to shorten life; that he had not at any time been afflicted with insanity, rupture, gout, fits, apoplexy, palsy, dropsy, dysentery, scrofula, or any affection of the liver; that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs; and that one T. W. was at that time his usual medical attendant." The declaration in the cause averred the truth of this declaration and statement of the assured. The defendant pleaded pleas, respectively alleging, (1—5), that the said declaration and statement of the assured was untrue in this: that at the time of making it he had spitting of blood,—consumptive symptoms,—an affection of the lungs,—an affection of the liver,—and a cough of an inflammatory and dangerous nature; 6thly, that at that time he was affected with a disorder tending to shorten life; 7thly, that he was not at that time in good health; and, 8thly, that he had falsely averred therein that T. W. was his usual medical attendant. Issues were joined on these pleas:—*Held*, that the plaintiff was entitled to begin at the trial, the issue on the seventh plea (and, *semble*, on the other pleas also) being upon him.

The defendant proved at the trial, that, about four years before the policy was effected, the assured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and that he died of consumption three years after the date of the policy. The judge, in summing up, read over the several issues to the jury, and in the course of it stated to them, that it was for them to say whether, at the time of his making the statement set forth in the declaration, the assured had had *such* a spitting of blood, and such affection of

N N N

M. W.

906 MALICIOUS INDICTMENT.

the lungs and inflammatory cough, as would have a tendency to shorten his life:—*Held*, that this was a misdirection; for that, although the mere fact of the assured having spit blood would not vitiate the policy, the assured was bound to have stated that fact to the insurance company, in order that they might make inquiry whether it was the result of the *disease* called “spitting of blood.” *Geach v. Ingall*, 95

LIQUIDATED DAMAGES.

See PENALTY.

LIMITATION ACT, 3 & 4 WILL. 4, c. 27, s. 8.

The stat. 3 & 4 Will. 4, c. 27, s. 8, applies to tenancies from year to year created before and existing at the passing of the act. *Doe d. Jukes v. Sumner*, 39

MALICIOUS INDICTMENT.

For Assault—Reasonable and probable Cause.

On the trial of an action for maliciously indicting the plaintiff for an assault, the facts proved were as follows:—The defendant came to the house of the plaintiff (which was let out in sets of chambers) to inquire for a person who he said lived there, but being informed that no such person lived there, used abusive language, and on being required by the plaintiff to go away, laid hands upon him, upon which the plaintiff forced him out. There was contradictory evidence as to the degree of force used by the plaintiff in doing so. The defendant indicted the plaintiff for an assault; the bill was found, and the indictment tried, and the plaintiff was acquitted.

On the trial of the action, the learned judge directed the jury, that if the

MASTER AND SERVANT.

defendant preferred the indictment with a consciousness that he was in the wrong in the transaction, there was no reasonable or probable cause for the indictment:—*Held*, that this direction was substantially correct. *Hinton v. Heather*, 131

MASTER AND SERVANT.

Dismissal for Disobedience.

Assumpsit for the wrongful dismissal of a domestic servant, without a month's notice or payment of a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his service during the night; that he refused such leave, and forbade her from so absenting herself; and that against his will she nevertheless absented herself for the night, and until the following day, whereupon he discharged her. Replication, that when the plaintiff requested the defendant to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness, and was in imminent danger of death, and, believing herself likely to die, requested the plaintiff to visit her to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic

affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c.:—*Held*, on demurrer, that the plea was good, as shewing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as shewing no sufficient excuse for such disobedience. *Turner v. Mason*, 112

MODUS.

A modus, that, in lieu of tithes arising out of lands in the occupation of any person *not inhabiting* within the parish, there should be a customary payment of 1s. per acre, and where the lands are in the occupation of a person *inhabiting* within the parish there should be a like payment of 6d. per acre, is good. *The Mayor, Aldermen, and Burgesses of Bridgewater v. Allen*, 393

MONEY HAD AND RECEIVED.

1. D. was appointed by deed, by the plaintiff (the mortgagor of an estate) and P. (the mortgagee) to receive the rents of the estate; and by the terms of the deed he was, after allowing for taxes and repairs, to hold all the remaining rents in trust for the purposes therein specified: viz. 1st, to pay taxes; 2ndly, the costs of collection; 3rdly, a commission; 4thly, premiums on a policy of insurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July in each year, of the accruing interest on the principal money secured, and to pay the *ultimate surplus*, if any, to the plaintiff; with a proviso, that, if, on the 6th January and 6th July, he should have rents and profits in hand, it should be

lawful for him to retain the whole or part for the purpose of paying the premiums in that year on the policy of insurance. D. did not execute the deed:—*Held*, that D. was not bound by the terms of this deed to pay the surplus *existing on each* 6th January and 6th July to the plaintiff; and, therefore, that, although he had a balance in his hands on either of those days, after payment of the half-yearly interest, he was not liable (the trust still continuing) to be sued by the plaintiff for money had and received. *Bartlett v. Dimond*, 49

2. S. being indebted to the defendants, who had acted as his solicitors, in a large sum of money, they, before his bankruptcy, received certain sums belonging to S. from his agent, and applied them in discharge of their claims upon him. S. having afterwards become bankrupt, and his assignees having brought an action against the defendants to recover this money as money had and received to their use as assignees, the learned judge told the jury, that, if the defendants, before the bankruptcy, actually received the money to the use of the bankrupt, they held it after the bankruptcy to the use of the assignees, who were entitled to succeed on the issue of non assumpsit:—*Held*, that this was a misdirection, and that there ought to be a new trial, unless it was *clear* that the jury were not misled, and that it was afterwards explained away. *Pennell v. Ashton*, 415

MONEY PAID.

An auctioneer, who paid the duties on a sale of lands by auction, (where the lands were bought in at the sale, and the Commissioners of Excise refused to remit the duties), was held entitled to recover back the amount from his employer, in an action for *money paid*.

908 NOTICE TO PRODUCE.

That action is maintainable in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it; and it is not necessary that the defendant should have been relieved from a liability by the payment. *Brittain v. Lloyd*, 762

NOTICE OF ACTION.

Where an act provided that a plaintiff should not recover in any action for anything done in pursuance of the act, unless twenty-one days' notice of action should be given:—*Held*, that the defendant must plead the want of such notice, or he could not avail himself of it. *Davey v. Warne*, 199

NOTICE TO QUIT.

A notice to quit a house held by the plaintiff as tenant from year to year was given to him on the 17th June, 1840, which required him to quit the premises "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." The tenancy had commenced on the 11th October in a former year:—*Held*, that this was not a good notice for the year ending on the 11th October, 1841. *Mills v. Goff*, 72

NOTICE TO PRODUCE.

In an action on a bill of exchange, to which the defendant pleaded a plea of fraud and covin,—*Held*, that a notice by the defendant to produce the bill, left in the letter-box of the office of the plaintiff's attorney in London at half-past eight o'clock on the evening before the cause was tried at the Middlesex Sittings, the plaintiff also being resident in London, was too late:—*Held*, also, that the plaintiff

PATENT.

was not bound to produce the bill on the trial without notice. *Lawrence v. Clark*, 250

ORDER FOR PAYMENT OF MONEY.

See **BILLS AND NOTES, IV.**

PARTICULARS OF DEMAND.

The plaintiff's particulars, in an action for money had and received, stated, that the action was brought to recover the sum of 13*l.* 6*s.*, for money received by the defendant as the treasurer of a club, for the use of the plaintiff, as the drawer of the second horse in the Derby stakes, according to the rules of the said club. The defendant pleaded, that the money was subscribed to an illegal lottery; and it was therefore held, that the plaintiff could not recover the 13*l.* 6*s.*:—*Held*, that he could not, under these particulars, recover back his own stake of £2.

Quære, whether, where a party claims, as winner, the whole of the stakes deposited on an illegal wager, he can recover back his own stake as money received to his use by the stakeholder. *Mearing v. Hellings*, 711

PATENT.

1. In an action for the infringement of a patent, the defendant delivered a notice of objections, one of which stated that the patentee did not, by the specification in the declaration mentioned, sufficiently describe the nature of the supposed invention; and the other stated that he had not caused any specification sufficiently describing the nature of the supposed invention to be duly inrolled in Chancery:—*Held*, that the last objection

was not sufficiently precise; and the Court ordered an amendment, which was made by inserting the word "other" before "specification." *Leaf v. Topham*, 146

2. Original letters patent, for a term of fourteen years, were dated on the 26th of February, 1825, and renewed letters patent were dated 26th of February, 1839:—*Held*, that the day of the date must be reckoned inclusively, and that the former term expired on the 25th of February, 1839, and consequently the renewed letters patent were granted after the original letters patent had expired.

Renewed letters patent, granted under 5 & 6 Will. 4, c. 83, s. 4, are not void if dated after the expiration of the term for which the original letters patent were granted, but may be granted by the Crown after the expiration of that term, provided the preliminary steps which the 4th section of the act requires to be taken by the patentee were complied with before that term ended.

But compliance with that condition, it being introduced in the 4th section in the form of a proviso, need not be averred by the plaintiff in his declaration; but non-compliance with it should be pleaded by the defendant.

Parties, however, who use the invention in the interval are not responsible.

Renewed letters patent were granted to the plaintiff "*upon his securing* to C. W. (the original inventor) an annuity of £500, so long as the letters patent should last:—"*Held*, that the meaning of this condition was, that a security should be given to C. W. for the annuity, but that whether it was given before or after the letters patent was immaterial; and that an averment, that the annuity was at the date of the new letters patent *secured*, was supported by proof of a deed to se-

cure the annuity, executed before the new letters patent were granted.

The power of renewal is not confined to *grantees*, but extends to *assignees*, of letters patent; and such renewed letters patent, granted to the *assignee*, are good by the stat. 5 & 6 Will. 4, c. 83, independently of the 7 & 8 Vict. c. 69. *Russell v. Ledsam*, 574

PAVING ACT, 57 GEO. 3, c. 29.

Construction of.

A surveyor appointed under the Metropolitan Paving Act, 57 Geo. 3, c. 29, has no right, under the 75th section of the act, to remove a ladder placed against a house for the purpose of whitewashing it, for that section applies only to the erection of hoards or scaffoldings, or to the placing of posts, bars, rails, or boards, by which an inclosure is made.

A license granted by the surveyor under that section, to erect a hoard or scaffolding, &c., on the footway of No. 14, Porter-street, was held not to authorise the licensee to erect one in another street or court, although it formed one of the sides of the house in Porter-street.

Where an act provided that a plaintiff should not recover in any action for anything done in pursuance of the act, unless twenty-one days' notice of action should be given,—*Held*, that the defendant must plead the want of such notice, or he could not avail himself of it. *Davey v. Warne*, 199

PENALTY.

Breach of Covenant not to carry on Trade.

The defendant, by deed, assigned to the plaintiff his business as a surgeon and apothecary, carried on by the de-

fendant in Park-street, Camden-town: and the defendant covenanted, that he should not nor would, directly or indirectly, by himself, or in copartnership with any other person or persons, carry on or exercise his practice or profession of a surgeon and apothecary, or either of them, either by residing or visiting any patient within the distance of three miles from the then place of business of the defendant, in Park-street aforesaid: and that, in case of any breach of this covenant, the defendant should and would pay to the plaintiff the full sum of £500, to be recovered against the defendant as and for liquidated damages, and not as a penalty. After the execution of this deed, the defendant attended several ladies in their confinements, within the three miles, and on one occasion received a sum of 14*l.* 14*s.* for his services; but he attended these persons with the knowledge and consent of the plaintiff, in consequence of a request by him that the defendant should for a time continue to visit the patients, to keep the connexion together: and the jury, in an action on the covenant, found that the defendant, in these instances, exercised the practice and profession of a surgeon, for the purpose of assisting the plaintiff:—*Held*, first, that for a breach of this covenant the measure of damages was the full sum, £500; but, secondly, that the above facts did not constitute a breach of the covenant. *Rawlinson v. Clarke*, 187

PILOT ACT.

Construction of.

The 2nd section of the Pilot Act, 6 Geo. 4, c. 125, enacts, that all vessels sailing as well up and down, or upon the river Thames or Medway, &c., between Orfordness and London

PLEADING.

Bridge, to the Downs, &c., (except as hereinafter provided), shall be piloted by pilots licensed by the Trinity House. The 58th section imposes penalties on masters acting as pilots, after a licensed pilot has offered to take charge of the vessel. Sect. 62 provides, "that nothing in that act contained shall extend, or be construed to extend, to subject to any penalty the master or mate of any ship or vessel, being the owner or part owner of such ship or vessel, and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own ship or vessel *from any of the places aforesaid*, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports:"—*Held*, that the "places aforesaid," in this section, mean Dover, Deal, and the Isle of Thanet; that, therefore, the clause exempts from penalties such masters only as navigate their vessel from Dover, Deal, or the Isle of Thanet; and, consequently, that the penalties imposed by sect. 58 were recoverable from a master piloting his own vessel on a foreign voyage commencing in the port of London, although he was a part owner, and resident in the Isle of Thanet. *Williams v. Newton*, 747

PLEADING.

See AGREEMENT.

COVENANT.

MASTER AND SERVANT.

SMALL TENEMENTS ACT.

I. Declaration.

- (1). *Allegation of part Payment. not traversable.*

Where a declaration in debt on a promissory note gave credit for part

payment of the principal and interest, — *Held*, that the allegation of part payment was not traversable, and, consequently, that a plea traversing that allegation was bad. *Hodgins v. Hancock*, 120

2. *Consideration for Promise—Variance—Duplicity.*

1. A declaration in assumpsit stated, that the plaintiff and defendant had been partners in trade, and had dissolved partnership, and that a bill of exchange, drawn by the plaintiff upon and accepted by M., for £40, being a debt due from M. to the plaintiff and defendant, had been lost by the plaintiff and defendant, with their indorsement in blank thereon: and thereupon, in consideration that the plaintiff delivered to the defendant another bill for £40, and four promissory notes for £20 each, for his share of the capital of the partnership, the defendant promised the plaintiff to bear the loss of half the amount that might not be paid in liquidation of the lost bill; provided, that, in case of M.'s making any difficulty, the plaintiff should obtain the approval of Messrs. B. & G., the defendant's advocates, to any proceedings against M.; and that the defendant would deposit, when required by the plaintiff, £40 in the hands of a third party, in case such deposit should be found necessary to recover the said debt due by M. Averment, that it became necessary to deposit the £40, for the purpose of recovering the debt due from M., M. being ready to pay the debt if the £40 were deposited at the Bank of England, to indemnify him against the payment of the lost bill; and that the Bank were ready to receive and hold the money. Breach, that the defendant refused to make such deposit:—*Held*, on special de-

murrer, that the promise of the defendant was an absolute promise to deposit the £40 if necessary, and was not dependent on the approval of his advocates: and that a sufficient consideration for, and breach of, such promise were alleged in the declaration. *Appelmans v. Blanche*, 154

2. Declaration in assumpsit stated, that the defendant had become and was tenant to the plaintiff of certain rooms, on the terms that the defendant should not allow any nails to be driven into the walls, that, if any damage should arise from so doing, he would pay the costs of repairing the same on vacating the apartments; and that, in consideration thereof, the defendant promised the plaintiff to use the rooms in a tenantlike manner, and not to allow any nails to be driven into the walls, &c., &c. The declaration then averred, that the defendant quitted possession of the rooms, and alleged, as a breach, that he did not use the rooms in a tenantlike manner, but, on the contrary thereof, pulled down bells and broke chimney-pieces and stoves, and drove nails into the walls; and although the costs of repairing the injuries of the walls amounted to £150, he had not paid that sum or any part thereof to the plaintiff.

Held, on general demurrer, that this declaration shewed a sufficient consideration for the defendant's promise, by alleging that he had become tenant on the terms of the special agreement, and that it was not necessary to allege that he became tenant to the plaintiff at the defendant's request.

Secondly, that the breach was sufficient, although it was not alleged that the bells, stoves, &c., were the property of the plaintiff.

Thirdly, that there was no variance between the promise and the breach; the promise being, that the defendant should pay the costs of the repairs

was cross-examined as to the state of the banking account, and not as to the fact of the defendant's being also a shareholder; but the plaintiff gave no affirmative evidence to prove that he was one:—*Held*, by *Pollock*, C.B., and *Platt*, B., (*Rolfe*, B., dissentiente), that the fact was sufficiently admitted by the pleadings and proceedings at the trial to entitle the plaintiff to recover. *Crellin v. Calvert; Same v. Brook*, 11

2. A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the *declaration*, and that the same may be quashed, is informal; it ought to pray judgment of the *writ* and declaration. *Davies v. Thomson*, 161

III. Pleas in Bar.

(1). *Argumentative Traverse.*

1. Assumpsit on a bill of exchange, drawn by W. on, and accepted by, the defendants, payable to the order of W. six months after date, and indorsed by W. to the plaintiff.

One of the defendants (H.) let judgment go by default: the other defendants pleaded, that, after they accepted the bill, and before it became due, and before it was indorsed to the plaintiff as in the declaration mentioned, W. waived the acceptance of the bill, and exonerated and discharged the defendants from the same, and from the payment of the bill; and that no person ever gave or received any consideration for the said indorsement. Another plea differed from the above only in stating, as the concluding averment, that the bill was indorsed to the plaintiff after it became due:—*Held*, on special demurrer, that these pleas were bad, for not shewing that W. was the holder of the bill at the time of the alleged waiver by him.

Another plea stated, that, after the making and accepting of the bill, and before it became due, it was delivered, so accepted by the defendants, to W.; and that, while W. was the holder and payee, and before it became due, W. indorsed it to the defendant H., and delivered it so indorsed to H., with the intention of divesting himself, and whereby he did divest himself, of all right, title, and interest in and to the bill, and of the right of suing thereon, and of indorsing the same again; that the bill was so indorsed to H. for a valuable consideration; that H. continued to be the holder of the bill from the time of the said indorsement thereof to him by W., until it was delivered by H. to the plaintiff; that the indorsement in the declaration mentioned consists merely of the last-mentioned delivery by H. to the plaintiff of the bill, so indorsed by W., and that it never was indorsed by W. otherwise than in this plea mentioned; and that, when it was so delivered by H. to the plaintiff, he had notice and knowledge of all the matters in this plea mentioned. There were other pleas, which differed from the above only in stating (instead of the allegation of notice) that there was no consideration for the delivery of the bill to the plaintiff, and that it was delivered to him after it became due:—*Held*, on special demurrer, that these pleas were bad, as amounting to an argumentative traverse of the indorsement to the plaintiff.

The directors of a company incorporated by act of Parliament for making a cemetery, being empowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be requisite to be done and transacted for the direction and management of the affairs of the company, are not thereby authorised to

upon an account stated with the plaintiff as executrix:—*Held*, a misjoinder.
Webb v. Cowdell, 820

(6). *Mutual Promises.*

Debt.—The declaration stated, that an action had been brought by the plaintiff, as assignee of an insolvent, to recover £1000 due to the insolvent; that all matters in difference in the action and between the parties were referred to arbitration, and thereupon, *in consideration of the plaintiff then agreeing to perform the award* on his behalf, the defendant agreed to perform the award on his behalf; that the arbitrator awarded that the plaintiff was entitled to recover from the defendant the sum of 372l. 3s., and stated, that, in finding that sum to be due to the plaintiff, he had allowed for all and singular the sums which were ever paid to the insolvent before he became such insolvent. The declaration then averred, that the defendant had not paid the sum awarded:—*Held*, that the averment of mutual promises made it an action of debt on a promise to perform the award when made, and not an action of debt on the award itself; and that the declaration was therefore bad. *Sutcliffe v. Brooke*, 855

(7). *Omission of Christian Names.*

The omission of the Christian names of persons mentioned in pleading (unless it be excused by consent) is ground of special demurrer. *Appelmans v. Blanche*, 154

(8). *Variance.*

See ante, (2).

Assumpsit.—The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would sell and deliver to S., on credit, goods

of the price *to an extent not exceeding* £100, the defendant promised the plaintiff, that, if S. did not pay for the same, she would do so on receiving three months' notice requiring payment. At the trial, the following guarantee was proved:—"In consideration of your supplying S. with goods *to the extent of* £100, I undertake to pay you for the same if he does not, on receiving three months' notice."

Semble, that there was no variance between the declaration and the guarantee proved: but, assuming the true construction of the guarantee to be, that the defendant was not to be liable until £100 worth of goods had been supplied, the declaration might be amended accordingly. *Dimmock v. Sturla*, 758

II. *Pleas in Abatement—Non-joinder of Parties.*

1. To an action of assumpsit for money had and received, the defendant pleaded in abatement, that the promises in the declaration mentioned were made by him jointly with certain other persons [thirteen in number, naming them] who were still living, &c. Replication, that the said promises were not made by the defendant jointly with the said other persons in the plea mentioned. The particulars of demand stated that the action was brought to recover "cash deposited or received by the defendant as the plaintiffs' banker." At the trial, the plaintiff began, and called a witness, who proved that she had a banking account, on which a balance was due to her to the amount stated in the particulars, with a banking company, called the Isle of Man Joint-stock Bank, which had since become insolvent, and in which the persons mentioned in the plea, and others also, were shareholders. The witness

was cross-examined as to the state of the banking account, and not as to the fact of the defendant's being also a shareholder; but the plaintiff gave no affirmative evidence to prove that he was one:—*Held*, by *Pollock*, C.B., and *Platt*, B., (*Rolfe*, B., dissentiente), that the fact was sufficiently admitted by the pleadings and proceedings at the trial to entitle the plaintiff to recover. *Crellin v. Calvert; Same v. Brook*, 11

2. A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the declaration, and that the same may be quashed, is informal; it ought to pray judgment of the writ and declaration. *Davies v. Thomson*, 161

III. Pleas in Bar.

(1). Argumentative Traverse.

1. Assumpsit on a bill of exchange, drawn by W. on, and accepted by, the defendants, payable to the order of W. six months after date, and indorsed by W. to the plaintiff.

One of the defendants (H.) let judgment go by default: the other defendants pleaded, that, after they accepted the bill, and before it became due, and before it was indorsed to the plaintiff as in the declaration mentioned, W. waived the acceptance of the bill, and exonerated and discharged the defendants from the same, and from the payment of the bill; and that no person ever gave or received any consideration for the said indorsement. Another plea differed from the above only in stating, as the concluding averment, that the bill was indorsed to the plaintiff after it became due:—*Held*, on special demurrer, that these pleas were bad, for not shewing that W. was the holder of the bill at the time of the alleged waiver by him.

Another plea stated, that, after the making and accepting of the bill, and before it became due, it was delivered, so accepted by the defendants, to W.; and that, while W. was the holder and payee, and before it became due, W. indorsed it to the defendant H., and delivered it so indorsed to H., with the intention of divesting himself, and whereby he did divest himself, of all right, title, and interest in and to the bill, and of the right of suing thereon, and of indorsing the same again; that the bill was so indorsed to H. for a valuable consideration; that H. continued to be the holder of the bill from the time of the said indorsement thereof to him by W., until it was delivered by H. to the plaintiff; that the indorsement in the declaration mentioned consists merely of the last-mentioned delivery by H. to the plaintiff of the bill, so indorsed by W., and that it never was indorsed by W. otherwise than in this plea mentioned; and that, when it was so delivered by H. to the plaintiff, he had notice and knowledge of all the matters in this plea mentioned. There were other pleas, which differed from the above only in stating (instead of the allegation of notice) that there was no consideration for the delivery of the bill to the plaintiff, and that it was delivered to him after it became due:—*Held*, on special demurrer, that these pleas were bad, as amounting to an argumentative traverse of the indorsement to the plaintiff.

The directors of a company incorporated by act of Parliament for making a cemetery, being empowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be requisite to be done and transacted for the direction and management of the affairs of the company, are not thereby authorised to

raise money for the purposes of the undertaking, by accepting or indorsing bills of exchange. *Steele v. Harmer*, 831

2. The plea of "no award" means no *valid* award. Therefore, a special plea to debt on an award, which shewed that the arbitrator had not awarded on all the issues in the cause referred to him, was held bad on special demurrer, as being an argumentative denial of its being a valid award. *Dresser v. Stansfield*, 822

(2). *Issuable Pleas.*

In an action by the indorser against the acceptors of a bill of exchange, the defendants, who were under terms to plead issuably, pleaded, (amongst others) the following pleas:—First, that after acceptance and before indorsement to the plaintiff, the drawer waived the acceptance, and discharged the defendants from payment thereof, of which the plaintiff had notice. Secondly, that, after the making and accepting of the bill, and before it became due, it was delivered by the defendants to W., the drawer; and that, after it was so accepted and delivered, and while W. was the holder and payee thereof, and before it became due, W. indorsed it to H., one of the acceptors, and then delivered it to H., with the intention of divesting himself, and thereby he did divest himself, of all right, title, &c. in the bill, and of the right of suing thereon, and of indorsing the same again; that it was indorsed to H. for a valuable consideration; that H. continued to be the holder of the said bill always from the time of the indorsement thereof until it was afterwards delivered by H. to the plaintiff; and that at the time when the bill was so delivered to the plaintiff by H., the plaintiff had notice of all the facts:—*Held*, that

these were issuable pleas. *Steele v. Harmer*, 136

(3). *Liberum Tenementum.*

Trespass.—The declaration stated, that the defendants, with force and arms, broke and entered a certain messuage, cottage, and dwelling-house, situate in Nova Scotia Gardens, in the parish of St. Martin, Bethnal Green, and then expelled the plaintiff from the possession and occupation of the same. Plea, that the messuage, cottage, &c., were the soil and freehold of the defendants, wherefore they committed the said trespasses in the said messuage, &c., as they lawfully might for the cause aforesaid:—*Held*, first, that the plea of lib. ten. was a good plea to this declaration, although the close was particularly described in the declaration; secondly, that it was not to be inferred from the declaration that there was any breach of the peace or forcible entry, the averment of *vi et armis* being a mere formal allegation that the defendants entered with *some* force, sufficient to enable them to get into possession. *Harvey v. Brydges*, 437

(4). *Of Notice of Dishonour—when sufficient.*

In an action by the indorsee of a bill of exchange, drawn payable to the defendant or his order, and indorsed by the defendant to the plaintiff, the defendant pleaded, that, after the indorsement by him to the plaintiff, and before the bill became due, the plaintiff, being then the holder, indorsed it to a person unknown, who presented it to the drawee for acceptance; that the drawee refused to accept it; and that the defendant had no due notice of the dishonour or non-acceptance. The plaintiff replied, *de injuriâ*:—

Held, on motion to enter judgment for the plaintiff, notwithstanding a verdict for the defendant on that issue, that the plea was a good answer to the declaration, inasmuch as it displaced the only title of the plaintiff alleged therein, viz. his title by indorsement from the defendant. *Bartlett v. Benson*, 793

IV. Replication.

(1). *Ambiguity—giving Colour.*

In trover, the first count was for twenty tons weight of hay; the second count for 100 bushels of barley, and twenty tons weight of straw; the third for 500 bushels of turnips. The defendant pleaded to the whole declaration, that, before and at the several times when &c., W. B. was lawfully possessed as of his own property of three equal undivided fourth parts of and in the goods in the declaration mentioned; that, before any of the times when &c., W. B., being so possessed thereof, delivered them to Richard Roe, to be by him kept for the said W. B.; and that the said Richard Roe, before any of the said times when &c., delivered them to the plaintiff: whereupon the defendant, as the servant of W. B., took them out of the possession of the plaintiff, &c., *quæ sunt eadem*.

Replication to the plea, so far as the same relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of the barley and seven tons weight of the straw, and divers, to wit, 200 bushels of the turnips, portions of the goods and chattels in the declaration mentioned, admitting that the defendant, as the servant of W. B., converted and disposed of the said *last-mentioned* goods and chattels as in the plea alleged, that W. B. was not possessed of the said undivided fourth parts as in the

plea mentioned; and, as to the plea, so far as it relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of the barley and seven tons weight of the straw, and divers, to wit, 200 bushels of the turnips, other portions of the goods and chattels in the declaration mentioned, that, admitting that W. B. was lawfully possessed of and in three undivided fourth parts &c., of and in the several goods and chattels *last aforesaid*, yet that the defendant, of his own wrong &c., converted and disposed of the said *last-mentioned* goods and chattels, &c.:—*Held*, on special demurrer to the replication, that it was bad for ambiguity, it being uncertain whether the "*last-mentioned* goods and chattels" referred to the whole of the goods mentioned in the declaration, or to the goods mentioned in the commencement of the replication.

Held, also, that the plea was a good answer to the declaration. *Ashton v. Brevitt*, 106

(2). *When insufficient.*

In an action of debt for goods sold, money lent, &c., the defendant pleaded, that, after the accruing of the cause of action and before the commencement of the suit, the plaintiff had petitioned the Court for the Relief of Insolvent Debtors, under 1 & 2 Vict. c. 110, and that, by virtue of an order of that Court, all his rights and property had, before the commencement of the suit, become vested in the provisional assignee. Replication, that, after the vesting order was made, the plaintiff's petition was dismissed by the said Court, and he was discharged from custody without taking the benefit of the act:—*Held*, that the replication was bad, inasmuch as the dismissal of the petition must be taken

once the action was
could not give any
none existed at the
as brought. *Yorston*
851

rejoinder.

verse too large.

payee against the
missory note, dated the
1843, for the payment of
before the 15th of
Plea, that, by the said
of the making, the
promised to pay the sum
ed, without specifying
the payment; that, after
made and issued, and
and delivered to the
note was, by the defend-
but without the same
changed, altered by the plain-
terial part, by making the
payable on or before the
April, 1845, and by the in-
the words "and to be paid
the 15th of April, 1845."
on, that, before and at the
making, issuing, completing,
entering the note to the plaintiff,
before the said alteration was
was meant and intended by
plaintiff and the defendants that
the note should be payable on or be-
the 15th of April, 1845, and that
words so inserted in the note
should be inserted therein; but, by the
stake of the plaintiff and the de-
fendants, the note was made and is-
ued, and was complete and delivered
to the plaintiff, without specifying any
time of payment; that the alteration
was made with the intent and purpose
of correcting the mistake, and making
the note payable, according to the
intention of the plaintiff and de-
fendants, within a reasonable time
before negotiation. *Redman v. Wilson*
before and at the

issuing, and completing of the note,
and before the alteration, it was not
intended by the plaintiff and the de-
fendants that the note should be made
payable on or before the 15th of
April, 1845.

Held, on special demurrer, first,
that the rejoinder was bad, as taking
too large a traverse, by putting in issue
the meaning of the parties *before* as
well as *at* the time of making the note;
secondly, that the plea was no answer to
the declaration, inasmuch as the Stamp
Laws authorise the stamping of cer-
tain kinds of notes before the *trial*,
and the plea did not shew that this
was not one of those cases.

Semble, that the replication was
bad, in not shewing that the promis-
sory note was not originally binding
upon the parties before the alteration.
Bradley v. Bardsley, 873

POLICY OF INSURANCE.

Where a ship, insured against the
perils of the sea, was injured by the
negligent loading of her cargo by the
natives on the coast of Africa, and in
consequence shortly afterwards be-
came leaky, and, being pronounced
unseaworthy, was run ashore *in order*
to prevent her from sinking, *and to*
save the cargo:—*Held*, that the in-
surers were liable for a *constructive*
total loss, the immediate cause of the
loss being the perils of the sea, al-
though the cause of the unseaworthi-
ness was the negligence in the load-
ing. *Redman v. Wilson, Same v.*
Hay, 476

POOR-RATE.

*Ratesibility of Theatre under Local
Act.*

By a local act, 51 Geo. 3, c. c1,
after reciting a former act of the 12
Car. 2, whereby a yearly sum of £250
was charged upon the *house* of the

inhabitants of St. Paul's, Covent-garden, except Bedford House, for the support and benefit of the rector, curate, clerk, and sextons for the time being of that parish, that charge of £250 was repealed, and in lieu thereof a yearly sum of £520 was charged upon all *houses* within the said parish, to be assessed by the churchwardens, and paid by the *occupiers* of such houses respectively, and recoverable, in case of refusal to pay the sums assessed on the house or houses in their occupation, by distress:—*Held*, that the word "*houses*" in this act meant houses intended for human habitation, and that Covent Garden Theatre was not rateable under the act. *Surman v. Darley*, 181

PRACTICE.

See LIFE ASSURANCE.
WRIT OF TRIAL.

(1). *Counsel's Right to refer to Documents.*

Where depositions in equity are given in evidence at law, and the bill and answer are also put in to shew that the depositions are admissible in evidence, the opposite counsel has no right to refer to the bill and answer in his address to the jury. *Chappell v. Purday*, 303

(2). *Delivery of Paper Books.*

In the construction of the rule for the delivery of paper books to the judges before argument, Sunday is to be counted as one of the four days between the delivery of paper books and the day of argument, except it is the last day. *Hodgins v. Hancock*, 120

(3). *Inspection of Documents.*

In an action for breach of promise of marriage, the Court refused a rule

for the defendant to inspect letters written by the plaintiff to him, which he alleged contained a release of his promise, and which, after the breaking off the connexion, the defendant had returned to her upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part. *Goodliff v. Fuller*, 4

(4). *Judgment as in case of a Nonsuit.*

1. Where, after issue joined and notice of trial given for the sittings after Easter Term, the cause was made a remanet, by consent, to the sittings after Trinity Term, when the plaintiff withdrew the record,—*Held*, that the defendant was entitled to move for judgment as in case of a nonsuit. *M'Intyre v. Somers*, 102

2. The plaintiff, having given a peremptory undertaking to try at the London sittings after Easter Term, gave notice of trial accordingly, and entered the cause, which had been made a special jury cause, on the last day for entering causes for trial at those sittings, and the cause stood No. 20 in the list; but, there being only two days for the sittings, it was, with four others, made a remanet to the sittings after Trinity Term:—*Held*, that, under these circumstances, the plaintiff was not in default, so as to entitle the defendant to judgment as in case of a nonsuit for not proceeding to trial pursuant to his undertaking. *Lumley v. Dubourg*, 295

(5). *Service of Rule to compute.*

A rule to issue execution under 1 & 2 Vict. c. 110, s. 18, for money due upon an award and the Master's allocatur, is a rule nisi only in the first instance. And, *semble*, that such a rule ought to be personally served, notwithstanding that the award and

RAILWAY COMPANY.

allocatur, together with the rule making the order of reference a rule of Court, have been personally served, and the amount demanded. *Winwood v. Hoult*, 197

(6). *Successive Writs of Execution, and Entry of Continuances.*

In August, 1841, the defendant executed to the plaintiff a warrant of attorney, with a defeasance. Judgment was signed thereon on the 13th Sept. 1841, but the roll was never carried in. By a judge's order, obtained by consent on the 9th Sept. 1842, it was ordered that execution should issue on the judgment without a sci. fa. On the 14th Sept., a fi. fa. was issued, which was returned nulla bona on the 29th, and filed on the 20th December, 1842. In April, 1845, an alias fi. fa. was issued, under which the defendant's goods were taken. He afterwards became bankrupt:—*Held*, first, that the judge's order was not void as against the assignees, under 3 Geo. 4, c. 39; secondly, that the alias fi. fa. was regular; for that, since the stats. 2 W. 4, c. 39, and 3 & 4 W. 4, c. 67, succeeding writs of execution need not be tested on the return-day of the preceding writ, and may be sued out at any time afterwards, without the necessity of entering continuances on the roll. *Harmer v. Johnson*, 336

RAILWAY COMPANY.

Service of Process on.

An act incorporating a company for making a railway from Dublin to Drogheda enacted, that, in case of any summons or writ upon the company, "personal service thereof upon a secretary or clerk of the company, or leaving the same at the office of the company, or of a secretary or clerk, or

RAILWAY ACT. 919

delivering the same to some inmate at such office of the company, or at the usual place of abode of such secretary or clerk, or, in case the same respectively should not be found or known, then personal service thereof upon any other agent &c., or on any director of the company," should be deemed good service. A writ of summons having been issued out of this Court into Middlesex against the company, who had not any office in England, or any secretary or clerk to represent them here, was served upon one of the directors of the company in London:—*Held*, that such service was null and void; that the proper service was upon the secretary or clerk at the office; but that the parties residing in Ireland were not amenable to the jurisdiction of this Court. *Evans v. Dublin & Drogheda Railway Co.*, 142

RAILWAY ACT.

Construction of.

A railway act gave the company power to agree with the owners of lands which they were empowered to take for the purposes of the railway for the absolute purchase of their interest therein; and provided, that, if any difference should arise between them as to the value of the lands, or the compensation to be made in respect of them; or if, by reason of absence, the owner should be prevented from treating; or if he should fail to disclose or prove his title to the lands, &c., the amount of compensation should be settled by a jury, in the manner mentioned in the act. Another clause provided, that, if the owner of any lands, on tender of the purchase-money or compensation agreed for or awarded to be paid in respect thereof, should refuse to accept it; or if he should fail to make out a title to the lands in respect whereof

such purchase-money or compensation should be payable, to the satisfaction of the company; or if he should be gone out of the kingdom, or could not be found, or should refuse to convey, it should be lawful for the company to deposit the purchase-money or compensation payable in respect of such lands in the Bank of England, in the name of the Accountant-General, and thereupon all the interest in such lands, in respect whereof such purchase-money or compensation should have been so deposited, should vest absolutely in the company:—*Held*, that this latter clause applied *prospectively* to the period *after* the purchase-money was agreed upon, or the amount of compensation was settled by the jury; and, therefore, that the company could not, immediately upon the finding of the jury, pay the amount awarded by them into the Court of Chancery, and take possession of the land, but must first call upon the owner to make out a title to their satisfaction, although *before* the assessment by the jury he had failed to disclose or prove his title. *Doe d. Hutchinson v. The Manchester, Bury, and Rossendale Railway*, 687

RULE NISI.

A rule to discharge a rule absolute for a new trial on payment of costs, after demand and non-payment of the costs, is, in this Court, a rule nisi, which makes itself absolute unless cause be shewn against it within the time limited. *Phillips v. Warren*,

730

SEWER-RATE.

A sewer-rate, not being imposed directly by act of Parliament, is not a "parliamentary tax." *Palmer v. Earith*, 428

SMALL TENEMENTS ACT.

SHERIFF.

See EXECUTION.

Possession-money, what is.

The term "possession-money" does not include the expense of the keep of cattle seized by the sheriff. *Gaskell v. Sefton*, 802

SMALL TENEMENTS ACT, 1 & 2 VICT. c. 74.

Justification by Constable under.

Trespass for breaking and entering the plaintiff's dwelling-house, and removing his goods. Plea, that, after the passing of the 1 & 2 Vict. c. 74, C., one of the defendants, as agent of M., made his complaint in writing before justices of the peace acting for the hundred of R., being the district wherein the said dwelling-house &c. thereafter mentioned were situate, and then in petty sessions assembled &c., and thereby said that M. let to the plaintiff a tenement, consisting of &c., being the said dwelling-house &c., situate &c., for a term of one year, and so from year to year, under the rent of 4s., and that the tenancy was determined by notice to quit given by C., on behalf of M., the owner of the said tenement, on &c., and that, on &c., C., as agent and on behalf of M. served on the plaintiff a notice in writing of his intention to apply to recover possession of the said tenement. The plea then set out the notice, which was according to the form given in the schedule of the act; and alleged, that, complaint having been so made, and proof given to the justices of the holding and determination of the tenancy, with the time and manner thereof, they the said &c., being two of the justices acting for the district in which the said tenement was situate, duly issued their warrant, directed to the defendants, and all other constables and peace officers

STAMP.

acting for the several parishes within the hundred of R., reciting &c., and thereby authorised and commanded the defendants, and other constables and peace officers, or any of them, to enter on the said tenement, and deliver possession thereof to C. as such agent. The plea then justified the breaking and entering the premises, and removing the goods, by virtue of the warrant:—*Held*, on demurrer, that the plea was bad, for want of a distinct averment that any of the defendants was a constable or peace officer of the district within which the premises were situate. *Jones v. Chapman*, 124

STAMP.

(1). *Agreement indorsed on a Promissory Note.*

A., B., and C. made a joint and several promissory note for £100, payable to the plaintiffs, trustees of a banking company, or their order, on demand. A memorandum indorsed on the note at the same time, signed by A., B., and C., stated that the note was given to secure floating advances made by the company to A., from the respective times when such advances had been or might be made, together with commission, &c., not exceeding in the whole, at any one time, the sum of £100. In an action by the payees of the note against C., to which he pleaded the Statute of Limitations, the plaintiffs proved payments by A., in reduction of the floating balance, within six years, and sought to use the memorandum indorsed on the note to shew that such payments had reference to the note:—*Held*, that it could not be read in evidence without an agreement stamp. *Cholmeley v. Darley*, 344

(2). *License to use Patented Articles.*

Semble, a license, under seal, to
VOL XIV.

STATUTE OF FRAUDS. 921

use a patented article, does not require a stamp. *Chanter v. Johnson*, 408

(3). *Receipt in full of Balance of Account.*

The defendant having employed the plaintiff to do some plasterer's work for him, the latter required the former to pay him money on account for it weekly, as the work was done, which the defendant accordingly did, and receipts were given for the amount so paid. And the following receipt was given by the plaintiff to the defendant when the work was completed:—"1843. July 8. Received of Mr. G. L., the sum of 2l. 2s., being the balance of account up to this day, for houses in Wellington-road:"—*Held*, that this was an acknowledgment of a sum therein mentioned being received in satisfaction of a debt, whereof the amount is not specified, within the meaning of the clause in the schedule as to receipts in the Stamp Act, 55 Geo. 3, c. 184, which requires a 10s. stamp. *Birt v. Leigh*, 177

STATUTE OF FRAUDS.

(1). *Acceptance of Goods.*

The defendant, a builder at Wallingford, gave the plaintiff, a timber-merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway, to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, and arrived at the Wallingford station on the 19th of April, and the defendant was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the

O O O M. W.

922 STATUTE OF LIMITATIONS.

plaintiff himself until the 28th day of May, when he informed the plaintiff that he declined taking the timber:—*Held*, that although there might be a scintilla of evidence for the jury of an acceptance of the timber within the Statute of Frauds, yet that there was not sufficient to warrant them in finding that there was such an acceptance: and the Court set aside a verdict found for the plaintiff as not warranted by the evidence. *Norman v. Phillips*, 277

(2). *Parol Assignment of Term of Years.*

Semble, that an agreement by a lessee for the transfer of his interest in the term, (not exceeding three years), which, not being in writing, is invalid as an *assignment* by the Statute of Frauds, cannot operate as an *underlease*. *Barrett v. Rolph*, 348

STATUTE OF LIMITATIONS.

(1). *Conditional Promise.*

A., having signed, as surety for B., a joint and several promissory note made by A. and B., and being called upon after B.'s death for payment of the money due upon it, requested the holder to apply to E.'s executrix, stating (in writing), that "what she should be short he would assist to make up." The executrix having been applied to, but not paying anything,—*Held*, that A.'s conditional promise of payment became thereby absolute, and rendered him liable in an action brought against him on the note more than six years after its date, and after a reasonable time for payment by the executrix had elapsed. *Humphreys v. Jones*, 1

(2). *Acknowledgment.*

The following letter, written by

STOPPAGE IN TRANSITU.

the defendant to a clerk of the plaintiff, in answer to an application for payment of the debt—*Held* not sufficient to defeat a plea of the Statute of Limitations:—"I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." *Hart v. Prendergast*, 741

STATUTE OF USES.

When Use executed in Married Women.

By lease and release, by way of marriage settlement, lands, the inheritance of a wife, were conveyed by her to trustees and their heirs, to the use of the wife and her assigns, until the marriage; and from the solemnisation of the marriage, *in trust* for the wife and her assigns, during her life, *for her own sole and separate use*, independent of the debts, control, or engagements of the husband; and from her decease, to the use of the husband, his heirs and assigns:—*Held*, that the trustees did not take the legal estate during the life of the wife, but that the use was executed in her, notwithstanding the words "to her own sole and separate use," &c. *Williams v. Waters*, 166

STONE QUARRY.

See INCLOSURE ACT.

STOPPAGE IN TRANSITU.

Goods were forwarded in bales by ship to London, deliverable to B. & Co., or their assigns, who were factors, for sale, and were landed at the defendants' wharf. B. & Co. gave the

SURRENDER.

defendants orders to "weigh and deliver" the goods to M., who had contracted with B. & Co. for the purchase of them. They were accordingly weighed, and an account of weights sent to B. & Co., who made out invoices to M. accordingly. M. re-sold several bales of the goods, which were delivered by the defendants, upon his order, to the vendees; the rest remained on the defendants' wharf until they were stopped by B. & Co. as unpaid vendors. They were never transferred in the defendants' books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him:—*Held*, that, under these circumstances, B. & Co.'s right of stoppage in transitu was not determined by the part delivery to M.'s vendees. *Tanner v. Scovell.* 28

SUNDAY.

See BYE-LAW.

SURRENDER.

By Operation of Law.

W. H., being tenant from year to year to Lady H., died, leaving his widow in possession. J. H. some time afterwards took out administration to the deceased; but the widow continued in possession, paying rent to Lady H., with the knowledge of J. H., who never objected to such payment, or made any demand of rent:—*Held*, first, that there was no evidence of a surrender by operation of law, so as to create the relation of landlord and tenant between Lady H. and the widow: secondly, that there were no circumstances from which a tenancy from year to year to the administrator could be presumed. *Doe d. Hull v. Wood,* 682

TITHE COMPOSITION. 923

TENANCY FROM YEAR TO YEAR.

See SURRENDER.

TITHE COMMUTATION.

Costs of Issue.

The successful party in an issue directed under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 46, is entitled to costs, unless he has been guilty of some misconduct or bad faith, or has succeeded partially only; and this although the commissioner had previously decided in favour of the other party. *Earl of Stamford v. Dunbar,* 151

TITHE COMPOSITION.

In 1711, W. P., lord of the manor and patron of the church of Aston-le-Walls, being seised in fee of certain lands lying dispersed in the common fields of Aston, and J. W., being rector of the said church, and in right thereof seised of other parcels of lands, also lying dispersed in the said common fields, (being the glebe lands belonging to the rectory), and also of the tithes as well of the said common fields as of the demesne lands of the said W. P., and agreement was made, on the 1st of March, 1711, under the hands and seals of the said W. P. and the said J. W., by which it was agreed, that the said W. P. should convey to the said J. W., and his successors, for ever, certain lands therein specified, to be enjoyed as the glebe lands held by the church, and the rectors thereof, for ever; and also, that the said W. P. should grant to the said J. W., and his successors, for ever, an annuity of £40, to be charged on his manors and lands. And the said J. W. did thereby, for himself, and, as far as in
o o o 2

him lay, for his successors, covenant and agree with W. P., and his heirs and assigns, that all those pieces of land reputed as glebe lands should thenceforth be possessed and enjoyed by W. P., and his heirs, for ever; and also, that all the lands of which the said W. P. was the owner in Aston (including the lands the tithes of which were in question) should be freed and discharged from the payment of all manner of tithes, &c. Afterwards, on a petition to the ordinary, a commission was issued, under which it was certified to the ordinary that the exchange would not be prejudicial to the rector, and he granted his license for carrying it into effect. A bill in Chancery was afterwards filed by W. P. against J. W., the rector, and the bishop, the ordinary, in which suit a decree was made, in Trinity Term, 1715, that the agreement should be performed and the exchange confirmed. In pursuance of this agreement, J. W. took possession of the lands and enjoyed the same, and he and his successors received, as it became due, the annuity of £40 so given in exchange for the glebe lands and as a composition for the said tithes, until June, 1831, when the plaintiff became rector; and the plaintiff himself received it until Michaelmas, 1832, but not since. No tithes had been taken from the lands of the said W. P. so exempted from tithes by the agreement from the making thereof, and that agreement, at the time of the passing of the 2 & 3 Will. 4, c. 100, had not from the making thereof been set aside, abandoned, or departed from. The manor and all the said lands of the said W. P. descended to one E. P. before and on the 10th of July, 1833, and so continued till his death, in 1838, when they descended to one W. H. F. P., the defendant. On the 7th of June, 1833, a notice was served on certain

occupiers, as well as E. P., the owner of the lands in question, requiring the tithes to be set out and paid in kind to the plaintiff; and, on the 10th of July, 1833, a bill was filed in the Exchequer in equity against the occupiers, praying for an account of the single value of the tithes; but no bill was then filed against E. P., the owner of the lands; but, by an order of the 15th of January, 1835, the bill was amended, and E. P. was made a party defendant thereto. The cause having been heard, the bill was dismissed against E. P., but the Court directed that the occupiers should account for the tithes. Against that decree, the defendants, including E. P., appealed to the House of Lords, and on the 6th of February, 1840, the decree was reversed. Pending the appeal to the House of Lords, actions of debt were brought by the plaintiff against the same occupiers, under 2 & 3 Edw. 6, to recover the treble value of the tithes of the same lands which accrued subsequently to those sought to be recovered by the bill in equity, and in such action the plaintiff was held entitled to recover, and the treble value of the tithes was paid pursuant thereto.

A feigned issue having been brought under the 46th section of 6 & 7 Will. 4, c. 71, to try the validity of the decision of the Assistant Tithe Commissioner as to whether the above lands were free from tithes, and a special case having been brought for the opinion of this Court, stating the above facts,—*Held*, first, that the above agreement of 1711 was a valid composition for tithes, within the meaning of the 2nd section of 2 & 3 Will. 4, c. 100.

Secondly, that the proceedings and suits which took place in 1833 and subsequently, were not sufficient to take the case out of the statute, the plaintiff not having commenced any

suit or action against E. P. within one year from the passing of the act, within the meaning of the 3rd section. *Thorpe v. Plowden*, 520

TRANSFER OF DEBTS.

The plaintiff, a merchant at Sunderland, having given an order to B. & Co., at Dantzic, for a cargo of wheat, wrote to request that B. & Co. would hold it at the disposal of the defendants, merchants of Liverpool, who would lodge the necessary credits for the remaining balance, and communicated this to the defendants. A few days afterwards, and before the wheat was shipped from Dantzic, the plaintiff wrote to the defendants as follows:—"We request you will account to Mr. J. S., of Newcastle, for the proceeds of the wheat we have consigned to you, lying at Dantzic, in Messrs. B.'s possession, which we wrote about to you a few days ago." The defendants assented to this order, and informed S. (who was largely indebted to them) that they held the wheat to his account; and on its arrival, they rendered accounts of the sale of it to S., and placed the balance of the proceeds to the credit of his account with them:—*Held*, that the plaintiff's order to account to S. was an order transferring the proceeds to him, and not a mere order to pay to him, and was not revocable after the defendants had acted upon it. *Dickinson v. Marrow*, 713

TRESPASS.

See BANKRUPT.

TRIAL.

(1). *Motion for New Trial.*

A cause was tried on the 18th of April, in Easter Term, which commenced on the 15th; the distingas

was returnable on the 23rd, and a motion in arrest of judgment was made on the 26th:—*Held*, that the motion was too late within R. G. H. T., 2 Will. 4, s. 65, it not having been made within four days from the day of trial. *Moon v. Robinson*, 427

(2). *Withdrawal of Juror.*

Where, upon the trial of a cause, a juror is withdrawn by consent of counsel, if the plaintiff afterwards bring another action for the same cause, the Court will stay the proceedings. *Gibbs v. Ralph*, 804

TRUST DEED.

Construction of—"Ultimate Surplus."

D. was appointed by deed, by the plaintiff, the mortgagor of an estate, and P., the mortgagee, to receive the rents of the estate; and, by the terms of the deed, he was, after allowing for taxes and repairs, to hold all the remaining rents in trust for the purposes therein specified, viz. first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of insurance; and, lastly, to apply the surplus in or towards satisfaction, on the 6th of January and 6th of July in each year, of the accruing interest on the principal money secured, and to pay the *ultimate surplus*, if any, to the plaintiff; with a proviso, that, if, on the 6th of January or 6th of July, he should have rents and profits in hand, it should be lawful for him to retain the whole or part for the purpose of paying the premiums in that year on the policy of insurance. D. did not execute the deed:—*Held*, that D. was not bound by the terms of this deed to pay the surplus *existing on each* 6th of January and 6th of July to the plaintiff, and, therefore, that, although

he had a balance in his hands on either of those days, after payment of the half-yearly interest, he was not liable (the trust still continuing) to be sued by the plaintiff for money had and received. *Bartlett v. Dimond*, 49

VENUE.

Since the rule of H. T., 4 Will. 4, c. 8, a declaration for a penalty given by statute, which makes the action local, need not aver that the penal act was done in the particular county, if that county be the venue in the margin of the declaration. *Cook v. Swift*, 235

WAGER.

Illegal on a Foot-race.

A wager of less than £10 on a foot-race, to be run for a sum under £10, before the stat. 8 & 9 Vict. c. 108, s. 18, was legal and valid, and neither of the betters could recover back his stake from the stake-holder before the determination of the event. *Emery v. Richards*, 728

WARRANT OF ATTORNEY.

A warrant of attorney, which is not filed within the period prescribed by the 3 Geo. 4, c. 39, is void against the assignees in bankruptcy of the debtor, although judgment be signed and execution issued on it before the commission of the act of bankruptcy.

In such a case, the assignees may maintain money had and received against the execution creditor, to whom the goods were assigned by the sheriff in specie, at an appraised value. *Bittleston v. Cooper*, 399

WHARFINGER.

Liability of.

Goods were forwarded in bales by ship to London, deliverable to B. and

Co., or their assigns, who were factors, for sale, and were landed at the defendants' wharf. B. & Co. gave the defendants orders to "weigh and deliver" the goods to M., who had contracted with B. & Co. for the purchase of them. They were accordingly weighed, and an account of the weights sent to B. & Co., who made out invoices to M. accordingly. M. re-sold several bales of the goods, which were delivered by the defendants, upon his order, to his vendees: the rest remained on the defendants' wharf until they were stopped by B. & Co. as unpaid vendors. They were never transferred in the defendants' books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him:—*Held*, upon these facts, the defendants never stood in the relation of wharfingers to M., so as to be liable to an action on the case by him for the non-delivery of the goods to his order. *Tanner v. Scovell*, 28

WASTE.

Lessee for years cutting down *wil-lows*, and leaving the stools or butts, from which they will shoot afresh, is not waste, unless they are a shelter to the house, or a support to the bank of a stream against the water. *Phillips v. Smith*, 589

WATERCOURSE.

In case for the diversion of water, the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged.

It appeared in evidence at the trial, that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under 2 & 3 Will. 4, c. 71, s. 7,—*Held*, that he was entitled, under this declaration,

to recover in respect of his right to the flow of water to the *old* pond.
Hale v. Oldroyd, 789

WRIT OF TRIAL.

A writ of trial cannot issue under 3 & 4 Will. 4, c. 42, s. 17, where the sum indorsed on the writ exceeds £20, although a sum less than £20 is claimed by the particulars. And the Court will not amend the writ, by reducing the sum indorsed to the amount mentioned in the particulars, but will set aside the writ. *Goslin v. Cotterell*, 71









